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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 107.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED MAY 24, 1901.

(18,180.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1902.

1 *Original Petition for Mandamus.*

Filed Nov. 13, 1899.

STATE OF TEXAS,
County of Galveston.

To the honorable the supreme court of the State of Texas:

Your petitioner, P. O. Weber, a resident citizen of the county of Galveston, State of Texas, complaining of Charles Rogan, commissioner of the general land office of the State of Texas, in his capacity as such commissioner, respectfully represents to your honors:

That on the 11th day of August, 1899, said Charles Rogan was the duly appointed and qualified commissioner of the general land office of the State of Texas.

That your petitioner on the day and date last aforesaid being desirous to purchase some public lands belonging to the public school fund of the State of Texas, and which said State, through its laws, had then offered for sale, applied to the said commissioner of the general land office for the purchase of said lands at and for the price fixed by law for the same; and your petitioner otherwise fully complied with the terms of sale offered by the law authorizing him to become the purchaser from the State of Texas of said lands. That the lands so purchased by your petitioner are more fully described as follows:—

I.

Six hundred and forty acres of land situated in Polk county, Texas, and surveyed for the public free school fund by virtue of certificate No. $\frac{25}{280}$, issued to the H. & T. C. R'y Company, being survey No. 30.

II.

Three hundred and twenty acres of land in Jefferson county, Texas, surveyed for the public free school fund by virtue of certificate No. 205, issued to the Texas & New Orleans R'y Co., being the north half of survey No. 202. Each of the two aforesaid sections belonged on the said last-named date to the public school fund of the State of Texas and were at said time and still are detached and isolated from other public lands and are situated in counties or-

2 ganized prior to the 1st day of January, 1875.

That in applying for the purchase of the aforesaid lands your petitioner used the forms of application prepared for that purpose by the commissioner of the general land office together with the attorney general, as required by law, and filed his said application with the said commissioner of the general land office on the 11th day of August, 1899, and at the same time appended to said application the affidavit required by law to be made by applicants for the purchase of such lands, and paid to the treasurer of the State of Texas the sum required by law to be paid to the State in the pur-

chase of such kind and character of lands, and also filed with the commissioner of the general land office his obligation, payable to the State of Texas, for such balance and parts of the purchase price as by law are required to be paid in annual installments with interest at the rate of three per cent. per annum to the State. All of which said acts were done and performed in full and strict compliance with the law providing for the sale of all isolated and detached sections and fractions of sections of land situated in counties organized prior to the first day of January, 1875.

Your petitioner further avers that said commissioner of the general land office has rejected his said two applications and refuses to award said two sections of school land to petitioner in direct violation of the law, alleging as a pretended reason for his action that the said two sections so applied for to be purchased by your petitioner have heretofore been classified by the commissioner of the general land office,—the first as timber land, and the second as grazing land, and that the law is not applicable to sections of grazing and timbered land, but that all sections of land and fractions of sections in this State that are either classed as grazing or timber sections cannot be purchased under the law in force at the date of your petitioner's application for one dollar per acre, although such grazing and timber sections or fractions of sections are isolated and detached from other public lands and are situated in counties organized prior to the first day of January, 1875 (other than El Paso, Presidio and Pecos counties) and that there was at the date of the filing of
3 your petitioner's application no law in the State of Texas by and under which the commissioner of the general land office could lawfully have awarded the two aforesaid sections of land to your petitioner at the price of one dollar per acre offered therefor by your petitioner.

Now your petitioner avers it to be true that said two sections of land before and prior to the time that the same became isolated and detached were classified by the commissioner of the general land office, the one as timber land and the other as grazing land; but he says that such classification from and after the time that said lands became isolated and detached was and is no longer of any force or effect, because the provisions of the law requiring lands belonging to the public school fund to be classified do not relate or apply to isolated and detached sections or fractions of sections of such lands, situated in counties organized prior to the first day of January, 1875; but the price of such lands at the time petitioner applied therefor was fixed by law at one dollar per acre irrespective of any classification made of said lands either before or after the time they became isolated and detached, and that said classification is wholly useless and of no force and effect, and that by virtue of his acceptance of the terms of sale offered by said law itself, and by virtue of the filing of his application, affidavit and obligation with the commissioner of the general land office under the terms prescribed by law, and depositing with the said treasurer at the same time said several sums of money due the State of Texas for said sections of land, he became, in law, the purchaser of said two sections

of land (irrespective of said classification) and the commissioner of the general land office is without authority in law or equity to withhold from your petitioner his award of said lands, and by rejecting your petitioner's said application, he is acting in violation of the law and clouding your petitioner's title.

Wherefore, premises considered, plaintiff prays that the writ of mandamus issue to Charles Rogan, commissioner of the general land office of the State of Texas, commanding him that unless he show good cause to the contrary, that he do issue his award of sale to your petitioner for the said two surveys of land purchased by him from the State of Texas as aforesaid, for which your petitioner duly filed his application as aforesaid, and your petitioner be awarded all such other relief both general and special as he may show himself entitled to and recover all costs in this proceeding.

4

M. E. KLEBERG &
ASHBY S. JAMES,
Attorneys for Plaintiff.

STATE OF TEXAS, }
County of Galveston. }

Before me, the undersigned authority, on this day personally appeared J. R. Coryell, who being by me duly sworn on oath says that he is the duly authorized agent and attorney-in-fact of P. O. Weber, plaintiff in the foregoing suit, and that the facts set forth in the said plaintiff's petition are true.

J. R. CORYELL,
Agent & Attorney-in-fact for P. O. Weber.

Subscribed and sworn to before me, the undersigned authority, this 11th day of November, 1899.

[SEAL.]

F. W. BEISSNER,
Notary Public for Galveston County, Texas.

Endorsed: No. 838. P. O. Weber, relator, *v.* Chas. Rogan, commissioner general land office, respondent. Original petition for mandamus. Filed in supreme court by order of court November 13, 1899. Chas. S. Morse, clerk, by F. T. Connerly, deputy. M. E. Kleberg & Ashby S. James, for petitioner.

Respondent's Original Answer.

Filed Jan. 8, 1900.

In the Supreme Court of Texas, October Term, A. D. 1899.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner General Land Office, Respondent. } No. 838.

Now comes Chas. Rogan, commissioner of the general land office, respondent, by his attorneys herein, T. S. Smith, attorney general, and R. H. Ward, assistant attorney general, and demurs to the original petition of relator, and says that the same is insufficient in law, and shows no legal and sufficient grounds for the granting of the writ of mandamus prayed for.

And specially excepting to said petition, he says that the same is insufficient in law for the following reasons, to wit:

1st. Because it appears from the allegations of the petition that section 30 of 640 acres of land located by virtue of certificate No. 25/1280 in the name of the H. & T. C. R'y Co. and which relator seeks to purchase under art. 4218*y* of the act of 1897, (see Acts of 1897, p. 187) was classified as and was in fact timbered land and was valued at $8 per acre, and was not in fact, or classified, as agricultural land, and as said article 4218*y* only authorizes the commissioner of the land office to sell as detached land *agricultural* sections so detached, the law does not authorize the sale of said section 30 as a detached section, and the commissioner cannot be made by mandamus to make a sale of said section in violation of law.

2nd. Because it appears from the allegations in the petition that the north ½ of section 202 of 320 acres of land located by virtue of certificate No. 205 in the name of the T. & N. O. R'y Co. and which relator seeks to purchase under article 4218*y* of the act of 1897, p. 187, was classified as, and was in fact, grazing land and valued at $2.00 per acre, and was not in fact, or classified as, agricultural land, and as said article 4218*y* only authorizes the commissioner of the general land office to sell as detached land *agricultural* sections so detached, the law does not authorize the sale of said north ½ of section 202, as a detached section, and the commissioner cannot be made by mandamus to make a sale of said section in violation of law.

3rd. Because said article 4218*y* does not confer upon the citizen the absolute right to buy detached land, but provides that the same "*may* be sold," etc., thus giving the commissioner a discretion as to whether he will sell the same as detached land, which discretion cannot be controlled by the court. Of all of which respondent prays judgment of the court.

T. S. SMITH,
Attorney General, and
R. H. WARD,
Office Ass't Att'y Gen.,
Attorneys for Respondent, Chas. Rogan, Com.

6 First.

And should said demurrer and exceptions be overruled, for further answer to relator's petition, respondent says that it is true, as alleged by relator, that he made application to purchase the lands set forth in his petition, as alleged by him, which said applications were filed in the general land office. That the two applications to purchase said two tracts of land respectively were received and filed in the general land office on August 11th, 1899, certified copies of said two applications, together with all endorsements thereon, are hereto attached and marked respectively as Exhibits "A" and "B," and the same are hereby made a part of this answer. That this respondent refused to sell to relator section 30 in the name of H. & T. C. R'y Co. and located by virtue of certificate No. 25/1280 in accordance with said application for and on account of the following reasons, to wit: Because the same was applied for by relator at the price of one dollar per acre, $\frac{1}{10}$ cash, and the remainder payable in accordance with the requirements of the law, to be evidenced by his written obligation. That said land is pine-timbered land and is of the actual value of not less *the* (than) $8.00 per acre. That said land under the act of 1897 was classified according to law as pine-timbered land and valued at $8.00 per acre; that said classification and valuation were in strict conformity with the law and were in full force and effect before and at the time of the filing of the application of relator to purchase the same and *has* so remained ever since to the present time. That while said land was detached, it being in fact pine-timbered land, and not agricultural land, that he had no power to sell the same under article 4218*y* of the act of 1897, p. 187. This being his construction of the law, he refused to award said land to relator on his said application. Respondent further says that if the above construction of the law be wrong, then he further says that no writ of mandamus should be granted against him as to said section, because he says the law gives him a discretion as to whether he will sell said land or not, which discretion cannot be reviewed by the court. That it would be inequitable and unjust to the State to compel respondent to award said land to relator at the price of one dollar per acre when the fair reasonable market value of the same is not less than $8.00 per acre.

7 Second.

That as to said N. $\frac{1}{2}$ of section 202 located by virtue of certificate No. 205 in the name of the T. & N. O. R'y Co. for 320 acres of land, respondent says that he refused to sell the same to relator in accordance with his application (the same being Exhibit "B" attached to this answer) for and on account of the following reasons, to wit: 1st. Because the same was applied for by relator at the price of one dollar per acre, $\frac{1}{10}$ cash, and the remainder payable in accordance with the requirements of the law, to be evidenced by his written obligation. That said land is *grazing* land, and is of the actual value of $2.00 per acre. That said land was classified according to law as grazing land, and valued at $2.00 per acre; that said classi-

fication and valuation were in strict conformity with the law and were in full force and effect before, at the time of the filing of said application of relator to purchase the same, and *has* so remained ever since to the present time. That while said land was detached, it being, as a matter of fact, *grazing land* and not *agricultural* land, respondent avers that he had no power to sell the same under article 4218*y* of the act of 1897, p. 187. This being his construction of the law, he refused to award said land to relator on his said application. Respondent further says that if the above construction of the law is wrong, then he further says that no writ of mandamus should be granted against him as to said N. ½ section of land, because the law gives him a discretion as to whether he will sell said land or not, which discretion cannot be reviewed by the court. That it would be inequitable and unjust to the State to compel respondent to award said land to relator at the price of one dollar per acre when the fair reasonable market value of the same is not less than $2 per acre.

2nd. Respondent says that the said N. ½ section of land was lawfully classified and valued under the act of 1897, p. 84–'5, as watered grazing land and valued at $2.50 per acre. That on May 11th, 1897, said land on and in accordance with said classification * * * and valuation was lawfully sold to one McHenry Winburn. That said sale was in all things valid and vested the title to said land in the said Winburn; that on July 20th, 1899, the said Winburn having failed to pay the annual interest due the State on his pur-
8 chase of said land, on said day, respondent, as commissioner of the general land office, in strict conformity with law, duly and legally declared his said purchase of said land forfeited. That respondent, after said forfeiture, did not place said land on the market for sale until the 1st day of September, A. D. 1899, on which date he placed said land upon the market for sale as *grazing* land and valued at $2.00 per acre. That on said day in accordance with section 6 of the act of 1895,—Acts 1895, p. 64,—he notified in writing the county clerk of Jefferson county, Texas, *with* said N. ½ section of land was on the market for sale as grazing land at the value of $2.00 per acre. That until said notification was so sent to the county clerk, said land was not on the market for sale. That when relator made his said application to buy said land on August 11th, 1899, said land was not on the market for sale, and by reason thereof, relator had no right to buy the same and acquired no rights whatever by his application to purchase the same.

Third.

Respondent further says that the attempted purchase of said lands set forth in relator's petition was further illegal and void because he failed to accompany his applications to purchase said land with his affidavit to the effect that he desired to purchase the lands for a home and that he had in good faith settled on the same as is required by sec. 9 of the act of 1895,—see Acts of 1895, p. 65. That under said law said lands could only be sold to actual settlers. That relator had not settled on either of said tracts of lands and is now and was

at the time of his attempted purchase of said lands an actual resident of the city and county of Galveston, Texas.

Respondent further avers that by reason of all of the facts hereinabove stated that the attempted purchase of said lands by relator was and is absolutely null and void; and that by reason thereof he refused to award him said lands on his said applications to purchase the same.

Premises considered, respondent respectfully prays that the writ of mandamus be not granted against him as prayed for, and that he go hence without day, and that he have judgment against relator for all costs in this behalf expended.

T. S. SMITH,
Attorney General, and
R. H. WARD,
Office Ass't Att'y Gen.,
Attorneys for Respondent.

9 "EXHIBIT A."

Application and Affidavit to Purchase Detached Lands.

GALVESTON, TEXAS, *Aug.* 9, 1899.

To Hon. Charles Rogan, commissioner general land office:

I hereby apply to purchase, under the provisions of "An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of such lands and of the public lands of the State, and the patenting of any part of the said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, the following lands situated in Polk county, Texas, about — miles (give course) — from county site, agreeing to pay for same the price per acre below specified:

Section.	Township.	Block.	Certificate.	Grantee.	Acres.	Price per acre.	Classification.
30	.....	.....	25/1280 Covers	H. & T. C. R'y... P—269—Polk & Ty	640 ler.	1 00	

For the purpose of securing the said land and of complying with the law regulating the sale of the same, I hereby make and subscribe to the following oath, to wit:

I P. O. Weber do solemnly swear that I am buying this said land for my own use and not for any other person or corporation, and that said land is not occupied by any one, that my post-office address is Galveston in Galveston county, State of Texas.

(Signed) P. O. WEBER, *Applicant.*

Subscribed and sworn to before me, this 9th day of August, 1899.

[SEAL.] ——, —— *County, Texas.*

Obligation.

$624.00. School lands.

For value received, I, the undersigned, do promise to pay to the State of Texas the sum of six hundred & twenty-four dollars, with interest thereon as hereinafter specified, the same being for the balance of purchase-money for the following-described tract of land, purchased by me this day of the State of Texas, in accordance with the provisions of "An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of said lands and of the public lands of the State, and the patenting of any part of said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, to wit: all of section No. 30, block —, township — in Polk county, surveyed for the public school by the virtue of certificate No. 25/1280 issued to the H. & T. C. R'y.

The annual interest of three per cent. upon all unpaid principal, together with one-fortieth of the original principal, I am to pay or cause to be paid to the State treasurer, at Austin, Travis county, Texas, on or before the first day of each November thereafter, until the whole purchase-money is paid. And it is expressly understood that I am to comply strictly with all the conditions, limitations and requirements, and am subject to, and accept all the penalties contained and prescribed in the above-recited act.

Witness my hand this 9th day of Aug. A. D. 1899.

P. O. WEBER.

Wrote 9, 27, '99 Rog.

This application is rejected because applicant applies for same at $1.00 per acre $\frac{1}{40}$ cash & executing his obligation for $\frac{39}{40}$ of same.

This land under act of 1887 was classified as pine timber and valued at $8.00 per acre & that being the classification & valuation on the date of the filing of this application a sale at $1.00 is declined.

9, 23, '99.

K.

[Endorsed.]

No. 58809.

Application of P. O. Weber, Galveston, to Purchase Detached Land.

640.

Section.	Block.	Certificate.	Township.	Grantee.
30	....	25/1280	....	H. & T. C. R'y.

In Polk county.
Received Aug. 11, 1899.
Awarded —— —.
Rej. & refund.

—— ——,
Commissioner General Land Office.

[Written across face in pencil:] Detached 11, 13, '99 Crum.

Pine timber &c.
Roll ——.
Abst. ——.
Class G.
Appr'm't 1.—8.00. Over.
Appl'n ——.
Oblig'tion ——.
Seal ——.
Map ——.
Lease ——.

GENERAL LAND OFFICE, AUSTIN, TEXAS, *Nov.* 13, 1899.

I, Charles Rogan, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, together with all the endorsements thereon now on file in this office.

In testimony whereof, I hereunto set my hand, and affix [SEAL.] the impress of the seal of said office the date last above written.

CHARLES ROGAN,
Commissioner General Land Office.

10 "EXHIBIT B."

Application and Affidavit to Purchase Detached Lands.

GALVESTON, TEXAS. *Aug.* 5, 1899.

To Hon. Charles Rogan, commissioner general land office:

I hereby apply to purchase, under the provisions of "An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of such lands and of the public lands of the State, and the patenting of any part of the said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, the following lands situated in Jefferson county, Texas, about — miles (give course) — from county site, agreeing to pay for same the price per acre below specified:

Section.	Township.	Block.	Certificate.	Grantee.	Acres.	Price per acre.	Classification.
N. ½ 202	... .	.....	205	Tex. & N. O. R'y. O K.	320	1 00	

For the purpose of securing the said land and of complying with the law regulating the sale of the same, I hereby make and subscribe to the following oath, to wit:

I P. O. Weber do solemnly swear that I am buying this said land for my own use and not for any other person or corporation, and that said land is not occupied by any one, that my post-office address is Galveston in Galveston county, State of Texas.

(Signed) P. O. WEBER, *Applicant.*

Subscribed and sworn to before me, this 9th day of August 1899.

B. K. GOREE,

[SEAL.] *Notary Public, Galveston County, Texas.*

Obligation.

$312.00. School lands.

For value received, I, the undersigned, do promise to pay to the State of Texas the sum of six hundred & twenty-four dollars, with interest thereon as hereinafter specified, the same being for the balance of purchase-money for the following-described tract of land, purchased by me this day of the State of Texas, in accordance with the provisions of "An act to provide for the sale of all lands hereto-

fore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of said lands and of the public lands of the State, and the patenting of any part of said lands for church, cemetery or school-house sites, and to prevent the free use, occupancy, unlawful enclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor," as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, to wit: all of section No. N. ½ 202, block —, township — in Jefferson county, surveyed for the public school by the virtue of certificate No. 205 issued to the T. & N. O. R'y.

The annual interest of three per cent. upon all unpaid principal, together with one-fortieth of the original principal, I am to pay or cause to be paid to the State treasurer, at Austin, Travis county, Texas, on or before the first day of each November thereafter, until the whole purchase-money is paid. And it is expressly understood that I am to comply strictly with all the conditions, limitations and requirements, and am subject to, and accept all the penalties contained and prescribed in the above-recited act.

Witness my hand this 9th day of Aug. A. D. 1899.

P. O. WEBER.

Wrote 10, 5, '99—Rog.

This land was sold to McHenry Winburn, May 11, 1897, on the classification & valuation made under the act of 1887, which was watered, grazing land, valued at $2.50 per acre. Said sale was forfeited for non-payment of interest July 20th 1899, and this department on Sept. 1st 1899 placed this land on m'k't as grazing land, valued at $2.00. This application must be rejected for two reasons:

1st. At the date of filing this application Aug. 11, 1899 this land was not on market, and an application to purchase must date after land is placed on the market.

2d. This land is classified as grazing land & valued at $2.00 per acre, hence, the application at one dollar is declined.

9, 23, '99.

K.

[Endorsed.]

No. 58795.

Application of P. O. Weber, Galveston, to Purchase Detached Land.

320.

Section.	Block.	Certificate.	Township.	Grantee.
N. ½, 202	.....	O K. 205	.....	Tex. & N. O. R'y.

In Jefferson county.
Received Aug. 11, 1899.
Awarded —— —.
Rej. & refund.

—— ——,
Commissioner General Land Office.

Roll ——. 7, 20, '99.
Abst. 41484. Not on market.
Class G—O K.
Appr'm't 1—$2.00.
Appl'n ——.
Oblig'tion ——.
Seal ——.
Map O K. Over.
Lease ——.

GENERAL LAND OFFICE, AUSTIN, TEXAS, *Nov.* 13, 1899.

I, Charles Rogan, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, together with all the endorsements thereon now on file in this office.

In testimony whereof, I hereunto set my hand, and affix [SEAL.] the impress of the seal of said office the date last above written.

CHARLES ROGAN,
Commissioner General Land Office.

11 Endorsed: No. 838. P. O. Weber, relator, *v.* Chas. Rogan, com., respondent. Respondent's original answer. Filed in supreme court Jan. 8, 1900. Chas. S. Morse, clerk.

Order of Submission.

P. O. WEBER
vs.
CHAS. ROGAN, Commissioner. } No. 838. Petition for Mandamus.

Jan. 8, 1900.—Submitted on briefs and oral arguments for both parties.

Opinion of Supreme Court.

Filed Jan. 22, 1900.

P. O. WEBER, Relator,
vs.
CHARLES ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

This is an original action for a writ of mandamus brought by the relator against the commissioner of the land office to compel the respondent to award to the relator two parcels of school lands which

he had made application to purchase. The allegations in the petition are not denied. From these allegations, it appears that on the 11th day of August, 1899, the two tracts of land,—one lying in Jefferson county and consisting of 320 acres, and the other situate in Polk county and embracing 640 acres,—were unappropriated public free-school lands, and were "isolated and detached" within the meaning of the act of May, 1897, with reference to the sale of the public free-school lands; and that on that day the relator filed an application to purchase each of these parcels at the price of $1 per acre. Each of these applications was in due form and was
12 accompanied by a tender of one-fortieth of the purchase-money and by the relator's obligation for the payment of the balance as provided by the law then in force. It was also averred that the respondent had refused to award him the lands.

The respondent for answer admits that the relator made application to purchase the lands, as averred by him in his petition, but avers in substance that under the law in force at the time the applications were made, the section in Polk county had been classified as timbered land and had been appraised at $8 per acre, and also that the half section had been classified as grazing land and had been appraised at $2.50. He claimed that because they were not agricultural lands, they were not subject to sale as "isolated and detached sections" under the law existing at the time the applications were made. In regard to the latter tract, it was also averred that it had previously been sold, but that he, as commissioner of the general land office, on the 20th of July, 1899, had declared the title of the purchaser forfeited for non-payment of interest, and that he did not again place it upon the market until the 1st of September thereafter. He therefore claimed that at the time of the application that the tract last mentioned was not subject to sale, for the reason that it had not been again placed upon the market. The allegations of the answer were excepted to but were not denied.

At the time the applications to purchase were made, the following law was in force: "The commissioner of the general land office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." (2 Batts' Rev. Stat., art. 4218*y*.) The determination of
13 the case before us depends upon the construction of this statute. If by this law it is made the imperative duty of the commissioner of the general land office to sell all isolated sections and parts of sections of the public free-school lands to the

first applicant without regard to their classification, then the writ here applied for should be awarded; otherwise, it should be denied.

Upon first impression, we were inclined to the opinion that the provision in question was directory and not mandatory. We recognize the rule announced by the late Chief Justice Stayton, in Smisson *v.* The State (71 Texas, 236) in the following language: "The word 'may' in the connection used in the sixteenth section was doubtless used in the sense of 'shall' and therefore was mandatory. Such is the settled construction where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification." The difficulty with the article is that the context tends in some degree to show that the word "may" in the last provision was used in its primary sense. The article begins by using the same word in the sense of permission, then it uses the word "shall"—an undoubted word of command—and then returns to the use of the word "may." If we had nothing but the letter of the article to throw light upon the intention of the legislature, we therefore think it would be difficult to say that the word "may" was not used in the same sense in the second instance as it was used in the first. But when we review the history of the provision, the difficulty disappears. The provision for the sale of "the isolated and detached" sections or parts of sections of the public free-school lands first appeared as section 22 of the act of April 1, 1887, in relation to the classification, lease and sale of the State's lands set apart for the benefit of the free schools, the university and the asylums of the State. That section reads as follows: "The commissioner of the general land office, under the direction of the governor, may withhold from lease any agricultural lands necessary for purposes of settlement, or, in his discretion, he may lease such agricultural lands in small quantities for a less period than five years, as the public interest and development of the country may seem to require; and no agricultural lands shall be leased if in the judgment of the commissioner they may be in immediate demand for settlement, but such
14 lands shall be held for settlement and sold to actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, at not less than two dollars per acre, upon such terms as the commissioner of the general land office may prescribe." This section was amended by section 26 of the act of May 4, 1895, but so much thereof as related to the sale of detached sections was left unchanged. Section 26 appears in the Revised Statutes of 1895 as article 4218y. It was amended in 1897, and, as so amended, was the law in force at the time the relator applied for the purchase of the lands in controversy. It thus appears that until this article was amended by the act of 1897, the commissioner had a discretion both as to the

terms of the sale and as to the price, subject, however, to a minimum limit. The article so amended took away all discretion as to the terms of the sale by providing that the sale should be "upon the same terms as other public lands are sold under the provisions of this chapter." (The chapter meant is chapter XII, A of title LXXXVII.) And it is very clear to our minds that if it had not been intended to take away all discretion as to the price, the legislature, instead of using the words "at one dollar per acre," would have said "at not less than one dollar per acre,"—the form of expression used in the very article they were amending. By changing the language from the words "not less than two dollars per acre" to the words "at one dollar per acre," they must have intended not only to reduce the minimum to one dollar per acre but also to fix the price at that sum. Such seems to have been the construction put upon the act by the next legislature for in 1899 the article was again amended so as to read "at not less than one dollar," &c. (Laws 1899, p. 235.) This last act had not gone into effect when the applications to purchase in this case were made.

It is to be observed that the provision in question only applied to lands lying in counties which had been organized before January 1, 1875. Isolated sections and parts of sections of such lands had long been upon the market when the act which embraced this pro-
15 vision was passed, and had remained unsold. The presumption was that they were of little value and not marketable under the general provisions of the act. They were like the unsold remnants of a stock of merchandise,—not sold because not saleable, upon the terms and conditions upon which the bulk of the stock had been sold. This consideration doubtless impelled the legislature to enact the special provision for the sale of detached lands. Therefore, in the original act, they removed all restrictions save as to a minimum price, and provided that such lands should be sold at such price not below $2 per acre and upon such terms as the commissioner of the land office might prescribe. It was ten years after the passage of the first act which conferred this power upon the commissioner that the amendment was passed which was in force when the relator made application to purchase the lands in controversy in this case. The consideration which led to the first action of the legislature bore with greater force at the time the amendment was adopted. The legislature doubtless then felt that the previous law had been inadequate for the disposition of these remnants of public free-school lands and that to effect a sale, it was necessary not only to lower but to fix the price and to take away all discretion in the premises from the commissioner. The history of the legislation and the circumstances surrounding its subject-matter impel to the conclusion that the purpose of the 25th legislature, in passing the amendment of 1897, was to make it the duty of the commissioner of the general land office to accept all bids for isolated sections and parts of sections of the school lands at a dollar an acre, upon the purchasers tendering the part of the purchase-money and the obligation for the balance, as was required by the general law.

COPY BOUND CLOSE IN CENTER

But it is urgently contended that the provision applies only to agricultural lands, and that since the parcels in question have been classified, the one as timbered and the other as grazing lands, the relator acquired no right by his applications. This contention is based upon the fact that the first provision in the article is expressly applicable to the agricultural lands. The argument is that this shows that in adopting the article in question, the legislature had in mind only the agricultural lands and that therefore the words "all sections and fractions of sections" meant all sections and fractional sec-
16 tions of agricultural lands. We cannot concur in the proposition. We attach no importance to the fact that the provision about agricultural lands and that about detached parcels are found in the same section of the law. It is undoubtedly the custom to embrace provisions relating to divers matters in the same section or article of a statute and there can be no objection to the practice provided all relate to the same general subject named in the title of the act. In the provision in controversy, the legislature say "all sections and fractions of sections," and the words mean, literally, all such sections and fractions without regard to their classification as agricultural, grazing or timbered lands. We think they meant what they said. In the original act, the section which contains the provision as to isolated and detached lands is nearly the last. The previous twenty-one sections contained full regulations for the sale and lease of the free school and asylum lands. When this was done, there remained certain exceptions to be provided. The constitution required the lands to be sold and hence it was deemed proper to authorize such of them to be held for sale as were in immediate demand for actual settlement. Also, as has been previously shown, in order to effect a sale of "isolated and detached sections and fractions of sections" of the lands, it was expedient to except them from the general rule and to make special provision for the sale thereof. Not only was there no incongruity in providing for both of these exceptions in one section, but it seems to us that it was a natural and logical method of making the provisions. In the original section perhaps the most important provision in regard to the isolated lands is that any person, not a corporation, could be a purchaser. All other lands were to be sold to actual settlers only. Surely the lands most desirable for settlement and most likely to be applied for by actual settlers were those adapted to the purposes of agriculture. It therefore seems to us that if the legislature had desired to except either class from the operation of the provision, the agricultural lands are the last they would have excepted, for so far as we can see, every consideration which impelled them to except the isolated and detached sections from the general rule laid down by the statute, applied with more force to the timbered and grazing lands than to the agricultural sections.

17 But as to the half section situate in Jefferson county, there is another question to be determined. After the commissioner had declared that parcel forfeited, was it necessary that the forfeiture should be reported to the county clerk of the county in which the land is situate before it was again subject to purchase?

The provisions in general of the chapter regulating the sale of the public school and asylum lands, do not apply to the "isolated and detached sections and fractions of sections." As already seen, they required no classification; nor was any appraisement necessary as a condition precedent to their sale. Before the amendment of 1897, the commissioner fixed the price at not less than $2 per acre. Under that amendment, the law fixed it absolutely at $1, and directed that the lands should be sold upon the same terms as other public lands were sold, under the provisions of the chapter of which it was made a part. By "terms" are meant the times of the payment of the installments of the purchase-money and the rate of interest on the deferred payments. It does not mean under the same regulations, because, as we have seen, no regulations were necessary. The law having fixed the price and terms of sale, all that was necessary to acquire an inchoate title was to make application to the commissioner and to tender the proportion of the purchase-money required by the law to be paid in cash, together with the statutory obligation for the balance. (Jumbo Cattle Co. *v.* Bacon & Graves, 79 Tex. 5.)

We think the writ of mandamus should issue as prayed for and it is accordingly so ordered.

R. R. GAINES,
Chief Justice.

Judgment of Supreme Court.

Entered Jan. 22, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

Opinion delivered by Chief Justice GAINES:

On the 8th day of January A. D. 1900, the above cause was
18 called for trial, whereupon the relator, P. O. Weber, appeared by his attorneys, M. E. Kleberg and Ashby S. James, and the respondent Chas. Rogan, commissioner of the general land office, appeared by his attorneys, Thomas S. Smith, attorney general of Texas, and R. H. Ward, office assistant,—both parties announced ready for trial. The cause was submitted to the court on said date—and after due consideration thereof, because it is the opinion of this court that the writ of mandamus herein should issue, it is therefore considered, adjudged and ordered that the clerk of this court do issue a peremptory writ of mandamus as prayed for, directed to the respondent, Chas. Rogan, commissioner of the general land office of the State of Texas, commanding him to issue his award of sale to said P. O. Weber for the two surveys of land purchased by said P. O. Weber from the State of Texas, for which said relator has heretofore duly filed his application, said lands so purchased by said relator, P. O. Weber, being described as follows, to wit:

I. Six hundred and forty acres of land situated in Polk county, Texas, and surveyed for the public free-school fund by virtue of cer-

tificate No. 25/1280, issued to the H. & T. C. R'y Company being survey No. 30.

II. Three hundred and twenty acres of land in Jefferson county, Texas, surveyed for the public free-school fund by virtue of certificate No. 205, issued to the Texas & New Orleans R'y Co., being the north half of survey No. 202.

It is further ordered that the relator, P. O. Weber, recover of the respondent, Chas. Rogan, commissioner of the general land office of the State of Texas, all costs in this behalf expended and incurred. (Set aside March 8, 1900.)

Respondent's Motion for Rehearing.

Filed February 3, 1900.

In the Supreme Court of Texas, October Term, A. D. 1899.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Comm'r, *Relator.* } No. 838.

19 Now comes Charles Rogan, respondent herein, and moves the court to set aside its judgment rendered herein awarding a peremptory writ of mandamus against him, and to grant him a rehearing, for the following reasons, to wit: Because

First. The court erred in holding that art. 4218*y* of the act of 1897 made it the duty of the commissioner of the general land office to accept all bids for isolated sections of the school lands at a dollar per acre, upon the purchasers tendering the part of the purchase-money and the obligation for the balance as was required by the general law. Respondent alleges that when said article is construed with reference to all other parts of the law and in connection with the great injury done the State and to other lessees and purchasers of school land, by such construction, the intent of the legislature becomes manifest that it was intended to vest in the commissioner a discretion as to the sale of isolated sections of school land.

Second. The court erred in holding that the half section of land in Jefferson county, under the facts, was subject to purchase before the land was put upon the market for sale by the commissioner of the general land office.

Third. The court erred, under the law and facts stated, in holding that relator was entitled to purchase the land in controversy, and in awarding a peremptory mandamus against respondent requiring him to sell said lands to relator.

Respondent represents that Ashby S. James, who resides in the city of Austin, Travis county, Texas, and M. E. Kleberg, who resides in the city of Galveston, Galveston county, Texas, are the attorneys of record for relator.

Respondent prays that the court will grant him a rehearing

herein and on such rehearing refuse to award a writ of mandamus against him.

T. S. SMITH,
Attorney General, and
R. H. WARD,
Ass't Att'y Gen.,
Attorneys for Respondent.

Endorsed: Mo. No. 740—No. 838. In the supreme court. P. O. Weber, relator *vs.* Chas. Rogan, commissioner general land office, respondent. Respondent's motion for rehearing. Filed in supreme court February 3rd, 1900. Chas. S. Morse, clerk, by F. T. Connerly, deputy. T. S. Smith, att'y gen'l and R. H. Ward ass't att'y gen'l, attorneys for respondent.

20 *Precept.*

The State of Texas to the sheriff of Galveston county, Greeting:

You are hereby commanded that you serve upon M. E. Kleberg, attorney of record for relator in the case of P. O. Weber, relator, *vs.* Chas. Rogan, com'r, respondent, the accompanying certified copy of motion for rehearing made by T. S. Smith, attorney general, and R. H. Ward, assistant attorney general, attorneys of record for respondent in said cause, now on file in this office.

Herein fail not, but of this writ make due return, under the penalty prescribed by law, with your indorsement thereon, showing how you have executed the same.

Witness, the Hon. Reuben R. Gaines, chief justice of our said supreme court, with the seal thereof annexed, at Austin, this the 6th day of Feb'y, 1900.

[SEAL.]

CHAS. S. MORSE, *Clerk,*
By F. T. CONNERLY, *Deputy.*

Endorsed: Supreme court, Austin. P. O. Weber *vs.* Chas. Rogan, com'r. No. 838. Precept. Issued Feb'y 6th, 1900. Chas. S. Morse, clerk. By F. T. Connerly, deputy. Sheriff's return. Came to hand February 8th, 1900. Executed February 9th, 1900, by delivering to the within-named M. E. Kleberg, attorney of record for relator, in person, the accompanying certified copy of motion. Henry Thomas, sheriff Galveston county. By W. E. Thomas, deputy. Sheriff's fees, $1.00. Received back 2/11/1900.

21 *Opinion Granting Motion for Rehearing.*

Filed March 8, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent.
} Mo. No. 740. Petition for Mandamus.

The motion and argument for a rehearing contains much matter which would have been very properly addressed to the legislature

while it had under consideration the statute which gave rise to this suit; but which is hardly proper to address to a court which is called upon to construe the law. If there was any provision of the constitution which prohibits the legislature from passing improvident laws, we would most likely be amply justified in disregarding the law in question.

However, the motion calls our attention to certain provisions of the Revised Statutes in relation to the sale of timber upon the school lands and the timber lands themselves, which are claimed to be inconsistent with the idea, that the article in reference to "isolated and detached" sections was intended to apply to the timbered lands. This presents a point which was not presented upon the argument at the hearing and upon which further argument is appropriate. The motion for a rehearing is therefore granted and the cause will be set down for argument upon such day as may be agreed upon by the parties, with the consent of the court.

R. R. GAINES,
Chief Justice.

Judgment Granting Motion for Rehearing.

March 8, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } Mo. No. 740. Petition for Mandamus.

Opinion delivered by Chief Justice GAINES:

In this cause it is ordered that the motion of the respond-
22 ent for a rehearing, be granted,—that the judgment heretofore entered on Jan. 22, 1900, be set aside and the cause be set down for argument on point indicated in the opinion this day filed, for some day to be agreed upon by counsel, with the consent of the court.

Order on Resubmission.

April 9, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

Resubmitted on briefs and printed and oral arguments for both parties.

Opinion Refusing Writ of Mandamus.

Filed June 28, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

The argument for the respondent, upon the second submission of this case, has placed the matter in a new light and has led us to the conclusion that our former judgment was erroneous and that the writ of mandamus should be denied.

Our opinion is, that even if it be held that article 4218*y* applies to all lands alike, and if it takes away the discretion of the commissioner of the general land office to refuse a bid of one dollar per acre, yet the relator cannot have a judgment in this case as to the timbered section. That article prescribes that the lands therein designated shall be sold "upon the same terms as other public
23 lands are sold under the provisions of this chapter." There are no provisions in the chapter mentioned which are applicable to all lands alike. Timbered lands are to be sold for cash, and agricultural and pasture lands upon a long credit. So that, if the timbered sections be included in the article under consideration, the provision quoted admits of no reasonable construction save that the timbered sections are required to be sold as other timbered lands are authorized to be sold, under the provisions of the chapter, and the agricultural and pasture lands are to be sold as is provided in other articles for the sale of such lands; that is to say, the former for cash and the latter in equal annual installments extending over many years. This seems to us to be fatal in any event to the claim of the relator to the timbered section. If he had the absolute right to purchase the timbered section at $1 per acre, he could in no event have perfected his right to that land except by tendering the purchase-money in full. This he did not do.

But as to the half section of pasture land, the case is different. Under the statute, the pasture lands are saleable upon the same general terms as agricultural lands; and the relator having tendered one-fortieth of the purchase-money and his obligation for the payment of the thirty-nine additional annual installments, as required by the statute for the sale of such lands, was entitled to have the land awarded to him, provided the respondent was absolutely required to sell the land at one dollar per acre. Therefore, our conclusion as to the timbered section does not relieve us from the duty of reviewing our opinion upon the more important question and of determining whether or not the commissioner, under article 4218*y*, had a discretion to refuse an offer of one dollar per acre for sections of land which were isolated and detached.

In our former opinion, we held in effect, that the fact that the article under construction omitted the words "not less than" from section 22 of act of April 1, 1887, of which such article

was an amendment and for which it was a substitute, led to the conclusion that the purpose was to take from the commissioner of the general land office the discretion with which he was previously invested, to refuse the minimum price. The majority of the court are now of opinion that we erred in that conclusion. The rule is recognized that in the construction of statutes,
24 the history of previous legislation upon the subject should be considered, and that a change of language of a statute, by the omission or addition of one or more words, should ordinarily be presumed to have been made for a purpose. But the one controlling and effective rule of construction is that the intent of the legislature must govern. Every other recognized rule is subsidiary to this fundamental canon of construction and must yield when it is believed that its application would lead to a result contrary to that which the legislature actually intended. While the omission of the words "not less than" in the article we are considering tends to show that it was the intention of the legislature to deprive the commissioner of the power of fixing the price of isolated sections, it is not necessarily conclusive of that question. As indicated in our former opinion, if article 4218*y* of the act of 1887 had been the first provision upon the subject of the sale of isolated sections of the free-school lands, we should have felt constrained to hold that the word "may" as there used, was employed in the sense of permission and not of command, and this notwithstanding the well-recognized rule announced in the case of Smisson *v.* The State, there cited. Though it is a matter "in which the public have an interest to be * * * promoted by the exercise of a power * * * by a public officer" and though in such a case, it is the ordinary rule to construe "may" as meaning "shall," yet we thought that the context indicated that such was not the purpose. Such being the case, it is not unreasonable to presume that the legislature may have intended to use the word "may" in the ordinary sense of permission and have deemed it unnecessary to retain the words which were omitted in the former act. In that act, the word in question could not have been employed as a word of command, for the reason that by other terms employed the officer was empowered to reject any offer, in the event he deemed the price offered less than the value of the land.

Now it is to be noted that in every statute that has been passed which provides for the sale of the public lands, from the year 1883 down to the passage of the article under consideration, especial provision has been made for the sale of those which are chiefly valuable for the timber upon them. The act of April 12, 1883, provided that such lands should not be sold at less than five dollars per
25 acre, while other lands without water upon them were salable at a minimum price of two, and those with water at three dollars per acre. (Laws of 1883, p. 85.) Substantially the same provision is found in section 7 of the act of April 1, 1887. (Laws of 1887, p. 85.) That act also provides in substance that timbered lands shall be paid for in cash. The sections which contained these provisions were not amended by the act of April 8, 1889 (Laws 1889, p. 50); nor by that of April 29, 1891, (Laws of 1891, p. 180.) By

the act of April, 1895, the minimum price of agricultural lands was reduced to two dollars and that of pasture lands to one dollar per acre; but the minimum price of timbered land was left at five dollars, as previously fixed. This act also retained the provision that such lands should be sold for cash only. (Laws 1895, p. 61.) It also added the following section: "Sec. 16. The commissioner of the general land office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value: Provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment; Provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications to be made by the land commissioner: Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act." All these provisions, in relation to the sale of timbered lands and of the timber thereon, were retained in the act of May, 1897, of which article 4218*y* constitutes a part. Now, conceding, for the purposes of the argument, that the previous laws
26 in regard to the sale of the detached sections applied to pasture and timbered lands as well as to agricultural lands,—such provisions are not inconsistent with the previous policy of the law in relation to timbered land as shown by our legislation upon the subject, for the reason that before the act of 1897, the commissioner was not bound to sell at a fixed sum, but had the liberty to refuse any offer which, in his opinion, was less than the value of the land. Rare instances might exist in which a tract might not be worth more than the minimum fixed by the act. In such cases, he was empowered to sell at that price; but it was not to be presumed that he would sell any land at less than its actual value. But to say that it was the intention of the legislature in making the amendment, not only to reduce the minimum price of the isolated sections to one-half of what it had been under the previous law, but also to deprive the commissioner of all discretion and to make it his absolute duty to sell at that price, is to attribute to them a purpose to make a radical departure from the previous course of legislation upon the subject and to attach a value to detached sections of timbered lands in no degree consistent with the value fixed by them and by other legislatures upon timbered lands, when not detached.

What may be the actual value of these detached lands, we do not know; nor have we the means of ascertaining their value. It appears, however, in this case, that the timbered section in controversy had been lawfully appraised at eight dollars per acre; and from this the presumption may be indulged that there were other sections which had been appraised at more and which were worth much more than one dollar per acre. Under these circumstances, to hold that the legislature intended to force the sale of these detached sections merely because they were detached at twenty per cent. of the price put upon timbered lands generally, is to attribute to them a degree of improvidence which ought not to be imputed when the language of the statute admits of any other reasonable construction.

For these reasons, the majority of the court are of opinion that the word "may" in article 4218*y* of the Revised Statutes ought to be construed in its literal sense,—that is to say, as a word merely conferring a power upon the commissioner to sell the lands therein specified at one dollar per acre and not as making it obligatory upon him to do so. I incline to our former opinion, but am also inclined to concur in the result but upon a different ground. But since my views are not those of the majority of the court, it would serve no useful purpose to express them here.

27

The writ of mandamus is denied.

R. R. GAINES,
Chief Justice.

Judgment Refusing Writ of Mandamus.

June 28, 1900.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner, Respondent. } No. 838. Petition for Mandamus.

Opinion delivered by Chief Justice GAINES:

This day came on to be heard the application of P. O. Weber for a writ of mandamus, and the same having been duly considered, it is ordered that said application for writ of mandamus be and the same is, hereby refused; that the relator, P. O. Weber, pay all costs herein incurred, for which execution may issue.

Relator's Motion for Rehearing (Service Accepted).

Filed July 11, 1900.

In the Supreme Court of Texas.

P. O. WEBER
vs.
CHAS. ROGAN, Commissioner. } No. 838.

Plaintiff's motion for rehearing.

Now comes the plaintiff, P. O. Weber, and moves the court
28 to set aside the judgment rendered in this cause, refusing to grant the writ of mandamus, and to grant him a rehearing upon the following grounds:

I.

The court erred in holding that the word "may" in the last clause of article 4218*y*, was intended to be used by the legislature in a permissive sense and invested the commissioner of the general land office with power to sell isolated and detached sections, or fractional sections, of the public-school domain, at his discretion for any price not less than one dollar; for the following reasons:

(*a.*) Had such been the intention of the legislature, the amendment of said article, by the act of 1897, would have been made by striking out the word "two" and substituting therefor the word "one." This would have fully and intelligently accomplished this purpose; but such was not the amendment. The amendment struck out of the law of 1895, (art. 4218*y*, Revised Statutes, 1895) the words "at not less than two dollars" and inserted in lieu thereof the words "at one dollar;" thereby clearly evincing a purpose to change the minimum price to a fixed and unchangeable price and denying any and all discretionary power to the commissioner. This view is further strengthened by the fact that the amendatory act also deprived the commissioner of the power he had theretofore possessed to sell isolated lands "upon such terms as he might prescribe," and directed that the lands should be sold "upon the same terms as other public-school lands are sold, under provision of the law;" thus showing beyond controversy the purpose of the legislature to deprive the commissioner of all discretionary power.

(*b.*) In view of the constitutional requirement commanding the sale of all public-school lands, and the law carrying the same into effect, by which all school lands, not isolated and which require classification, shall be sold to actual settlers only in quantities not exceeding four sections to each settler; it is plain that the language of article 4218*y* in the act of 1897, means, and was intended to mean by the legislature, that all the isolated and detached sections, or fractions of sections of school lands, *must be sold*, and that in doing so, the sale "may" be made to any person whomsoever who will pay the

sum of one dollar per acre therefor, although such person is
29 not an actual settler. The word "may" in nowise relates to
the commissioner but applies exclusively to the purchaser. The language does not say that the commissioner "*may* sell;" but it says that the isolated sections shall be sold, and "may" be sold to any purchaser for the fixed price of one dollar per acre. All the school land shall be sold, those which are classified and not isolated, to actual settlers alone at not less than a minimum price fixed by the law; and those which are isolated and hence require no classification, "may" be sold to any purchaser though he be other than an actual settler.

(*c.*) If the construction adopted by the court be correct, then the commissioner may sell the isolated sections for a price not less than one dollar per acre to such person as he may select as an object of his favor or bounty. For the court holds that the commissioner may sell, or may not sell, to any applicant as he in his discretion may determine; thus giving him an opportunity to reward his friends and punish his enemies—a power at once repugnant to justice and destructive to equality before the law.

(*d.*) The construction adopted by the court is contrary to the well-recognized canon of statutory construction adopted in Smisson *v.* The State, 71 Tex. 222—holding that "may" is always used in the sense of "shall" where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification.

It plainly appears that the word "may" was not used in its primary signification for the reasons already stated.

(*e.*) That the legislature used the word "may" in the sense of "shall" appears conclusively from the emergency clause in the repealing act of 1899, repealing the act of 1897, in which the legislature gives as a justification and cause for the repeal, the very reason that the sale of this land which the act of 1897 required to be made, at the fixed price of one dollar, was to the detriment of the public-school fund. Nor is it an answer to this statement of the legislature that in the opinion of this court the act of 1897 was improvident
legislation; for the legislature itself, being a co-ordinate
30 branch of the government, is the exclusive judge of the
wisdom or improvidence of its legislation. So far as the record shows in this case, the legislation of 1897 fixing the price of isolated sections of school land at one dollar per acre, may not have been, and as is well known was not, at that time at all improvident. But the subsequent appreciation of the price of land under the general stimulus of prosperity throughout the entire country undoubtedly made it wise to pass the repealing act of 1899. For this reason the court cannot adopt as a safe canon of statutory construction, the value of the land in the year 1900.

(*f.*) That "may" was used in the sense of "shall" is further apparent from the fact that it is frequently so used throughout the entire statute, of which 4218*y* is a part. Thus it was apparent that

in the sixteenth section of the act under consideration by the court in Smisson *v.* State, providing that pasture lands and agricultural lands "may" be leased, the word "may" did not invest the commissioner with the power to lease or not as his discretion might dictate, but that "may be leased" meant "shall be leased." And again, in article 4218*f*, as amended in 1897, it is provided that in cases where lands have been forfeited that the purchasers may have their claims reinstated upon certain conditions.

Certainly every one will admit that the word "may" is there used in the sense of "shall" and that the commissioner would be without discretion to deny reinstatement to any purchaser who complied with the law.

Again, in section five of the act of 1895, the word "may" occurs twice in the proviso attached to said section, and is plainly used in the sense of "shall," as otherwise the sense of the section would be nullified.

II.

The court erred in holding that the relator is not entitled to have awarded to him the timbered section of land under any circumstances because he failed to tender one dollar per acre in cash for the same; for the following reasons:

(*a*.) There is no law that requires or directs that the commissioner or this court can or shall know that an isolated section bears grass or timber to distinguish it from any other isolated section.

31 The only lands upon which the law ascertains and the court knows, timber grows which are required to be paid for in cash by the statute, are such timbered lands as are not isolated and detached and which have been duly classified as timbered lands, and whose value has been fixed by appraisement. This is manifestly true for the statute divided public-school lands into two distinct divisions: One division embraces and places in a class, all isolated and detached sections whose price is fixed at one dollar per acre, and the other division embraces all other public-school sections. This last division is again divided, by personal inspection, and classed into "agriculture," "grazing," and "timbered" land and a minimum price is fixed upon each class under this division. With great particularity, the statute then fixes a method by which these lands shall be sold and the terms upon which these sales shall be made providing that all sales shall be upon forty years' time. Then by a proviso to the section fixing these terms of sale, it is enacted that for timbered land the purchaser shall be required to pay the full amount of the purchase-money at the time of his purchase.

Now, it is a universal rule of statutory construction that a proviso applies only to the particular section to which it is attached or at most, to such sections of the law as precede it. Applying this rule to the case in hand, we find that the timbered sections which shall be paid for in cash is "that timbered land" which is described and mentioned in the sections of the statute preceding this proviso, viz., land not isolated and detached but embracing larger quantities of land than one section, and which is required to be classified and

appraised. By no known rule of construction can this proviso be applied to isolated and detached sections which are mentioned in the subsequent article of the statute, and which are not classified and characterized either as timber, agriculture or grazing sections; therefore, when article 4218*y* directs that all isolated sections shall be sold at one dollar per acre upon "the same terms as other lands are sold under the provisions of this chapter," the terms referred to can only be those which apply generally to all public-school lands and not those which by inspection are confined to a particular class of land which in the very nature of things cannot form a
32 part of the lands which are isolated and detached. The law has not provided any machinery by which isolated lands can be classified, for the good reason that such classification would be useless and idle; inasmuch as the price of these lands is fixed at one dollar per acre. So that isolated lands are neither timbered, agriculture or grazing, but embraces *all* lands that are isolated—not *some*, but *all* isolated lands. There being no timbered lands which are isolated known to the law, it must follow that the price fixed by proviso for certain kinds of timbered lands, does not furnish the "terms" upon which isolated lands are to be sold.

6. The court holds in effect that "isolated sections" is not a distinct descriptive class—carried out of and subtracted from the three distinct descriptive classes of grazing, agriculture and timber classes. That an "isolated" section must be sold as one of these classes and at price and upon terms fixed *for* the three classes. It results that 4218*y* is in every sense a "dead letter," for it neither enlarges or restricts the provisions for sale of the three classes. And these provisions being held to control article 4218*y*, destroy it and no section can be sold without settlement at one dollar per acre.

(*b.*) But should the court however adhere to its opinion on this subject, then the relator tenders and offers to pay the sum of one dollar per acre in cash for the timbered section embraced in his application. And in this connection, the attention of the court is respectfully called to the fact that at the time of his application to the commissioner of the general land office for the timbered section in question, the application was not rejected upon the grounds that he failed to tender one dollar per acre in cash. Had such objection been made then, he would have tendered the cash; but the relator was required to make his application upon certain blanks or forms prepared by the commissioner of the general land office, and the said commissioner did not have, and could not, and did not furnish this relator with any blanks by which he was required or requested or notified to pay, in cash, the price of the so-called timber section in controversy; otherwise, he would have unhesitatingly done so. He submits, therefore, that he should not be denied this privilege now and his application being otherwise in due form, he requests that the court may fix a date by which he may pay in cash
33 the amount of money due for said section of land.

III.

By article 4218*y* of the act of 1897, the State of Texas offers to sell all isolated and detached sections and fractions of sections, of public-school lands, situated in counties organized prior to January, 1875, except in the counties of Presidio, El Paso, and Pecos, to any purchaser who will offer one dollar per acre therefor; payable one-fortieth cash and the balance in forty equal settlements, with interest thereon at the rate of three per cent. per annum, and who will execute his obligation for the deferred payments. Whenever this offer by the State is accepted, it becomes an executory contract between the State and such purchaser. It was error of this court, therefore, to hold that the commissioner of the general land office might refuse to execute this contract by declining to award such purchaser the lands applied for; for by so holding, the court gives to the statute an interpretation which violates the obligation of this contract and is repugnant to article 1, section 10, of the Constitution of the United States, forbidding the impairment of the obligation of contracts.

IV.

Hon. T. S. Smith, attorney general of the State of Texas, who now resides at Austin, Texas, is counsel for the respondent in this case, and relator prays that he be duly notified of this motion and that at a hearing thereof, relator be granted a rehearing.

All of which is respectfully submitted.

M. E. KLEBERG &
A. S. JAMES,
Counsel for Relator, P. O. Weber.

Endorsed: Mo. No. 798. P. O. Weber *v.* Chas. Rogan, com. Motion for rehearing. Filed in supreme court July 11, 1900. Chas. S. Morse, clerk, by F. T. Connerly, deputy. Overruled. We accept service of the within motion. Sept. 10th. T. S. Smith, attorney general.

34 *Order Overruling Motion for Rehearing.*

October 18, 1900.

P. O. WEBER
vs.
CHAS. ROGAN, Commissioner, Respondent. } Mo. 798. Petition for Mandamus.

This day came on to be heard the motion of the relator for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; that the relator, P. O. Weber, pay all costs of this motion.

Bill of Costs.

P. O. WEBER
vs.
CHAS. ROGAN, Comm'r. } No. 838.

Filing record	.50
Docketing cause	.50
Entering appearances	1.00
Filing briefs and arguments	7.80
Filing four extra papers	1.20
Filing and entering two motions	1.10
Entering judgment	1.00
Taxing costs	.50
Certified copy bill of costs	1.00
Recording two opinions	9.00
Orders	2.50
Issuing precept	1.00
Certified copy of motion	1.00
Sheriff's fees Galveston county	1.00
Total	$29.10

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Texas, holding sessions at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Texas before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between P. O. Weber and Chas. Rogan, commissioner of the general land office of the State of Texas wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and a decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of or commission held under the United States and the decision was against the title, right and privilege or exemption, especially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said P. O. Weber, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings
36 aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 15th day of April in the year of our Lord, one thousand nine hundred and one.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States in and for the Western District of Texas for the 5th Circuit,
By J. W. HANCOCK, *Deputy.*

April 15th 1901.
Allowed by
R. R. GAINES,
Chief Justice of the said Supreme Court of the State of Texas, at Austin, Texas.

Filed in supreme court April 15th 1901.
CHAS. S. MORSE, *Clerk.*

37 In the Supreme Court of the State of Texas, at Austin.

P. O. WEBER, Relator, *vs.* CHAS. ROGAN, Commissioner of the General Land Office, Respondent.	Original Application in the Supreme Court of Texas for a Writ of Mandamus.

Application for Allowance of Writ of Error.

To the Honorable R. R. Gaines, chief justice of the supreme court of the State of Texas:

Comes P. O. Weber by his attorney M. E. Kleberg and complains that in the records and proceedings, and also in the rendition of the judgment in a suit between P. O. Weber, plaintiff in error, and Charles Rogan, commissioner of the general land office of the State of Texas, defendant in error, in the said supreme court of the State of Texas, being the highest court of law or equity in the said State in which a decision could be rendered in said suit, and in which a final judgment was rendered against P. O. Weber on the eighteenth day of October A. D., 1900, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege and exemption severally set up or claimed under the said clause of said Constitution, all of which appears from the records and proceedings in the said suit, manifest error hath happened, to the damage of the said

P. O. Weber; wherefore the said P. O. Weber by attorney prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

M. E. KLEBERG,
Attorney for P. O. Weber.

Allowed, April 15th, 1901.
R. R. GAINES,
Chief Justice.

Filed in supreme court April 15th, 1901.
CHAS. S. MORSE, *Clerk.*

38 *Writ of Error Bond.*

Know all men by these presents, that we, P. O. Weber as principal and —— —— —— —— as sureties, are held and firmly bound unto Charles Rogan, commissioner of the general land office of the State of Texas, jointly and severally in the full and just sum of one thousand dollars, ($1,000.00) to be paid to the said Chas. Rogan, commissioner as aforesaid, his attorney, executors, administrators or assigns; to which payment well, and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this the 12th day of April in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a term of the supreme court of the State of Texas in a suit depen ling in said court between P. O. Weber, plaintiff in error and Chas. Rogan, commissioner of the general land office of the State of Texas, defendant in error, a judgment was rendered against the said P. O. Weber and in favor of the said Chas. Rogan, commissioner of the general land office of the State of Texas, and the said P. O. Weber having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Chas. Rogan, commissioner as aforesaid, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days from the date thereof;

Now the condition of the above obligation is such, that if the said P. O. Weber shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

In testimony whereof, we have hereunto signed our names.

P. O. WEBER,
By his attorney, M. E. KLEBERG.
J. R. CORYELL.
JNO. H. RUBY.

April 15th, 1901.
Approved by
R. R. GAINES,
Chief Justice Supreme Court of Texas.

39 I, J. R. Coryell do swear that I am worth, in my own right, at least the sum of one thousand dollars ($1000.00) after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description whether individual or security debts and after satisfying all incumbrances on my property which are known to me; that I reside in Harris county, State of Texas, and have property in said State liable to execution worth more than one thousand dollars ($1000.00).

J. R. CORYELL.

Sworn to and subscribed before me this 12th day of April A. D. 1901. As witness my hand and official seal.

[SEAL.]

R. H. HANNA,
Notary Public, Harris County, Texas.

I, Jno. H. Ruby, do swear that I am worth in my own right at least the sum of one thousand dollars ($1000.00) after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description whether individual or security debts and after satisfying all incumbrances on my property which are known to me; that I reside in Harris county, State of Texas, and have property in said State liable to execution worth more than one thousand dollars ($1,000.00).

JNO. H. RUBY.

Subscribed and sworn to before me this 12th day of April A. D. 1901. As witness my hand and official seal.

R. H. HANNA,
Notary Public, Harris County, Texas.

Endorsed: P. O. Weber *vs.* Chas. Rogan, commissioner. Writ of error bond. Filed in supreme court of Texas April 15th, 1901. Chas. S. Morse, clerk.

40 *Citation in Error.*

United States of America to Chas. Rogan, commissioner of the general land office of the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, at Austin, Texas, wherein P. O. Weber is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Gaines, chief justice of the supreme

court of the State of Texas, at Austin, Texas, this 15th day of April 1901.

R. R. GAINES,
Chief Justice.

Attest: CHAS. S. MORSE,
Clerk Supreme Court of Texas.

Service of the above citation in error is hereby waived on behalf of the defendant in error, Chas. Rogan, commissioner of the general land office of the State of Texas.

Austin, Texas, April 15th, 1901.

C. K. BELL,
Attorney General of Texas, Attorney for Def't in Error.

Endorsed: P. O. Weber *vs.* Chas. Rogan, commissioner. Citation in error. Filed in supreme court of Texas April 15th, 1901. Chas. S. Morse, clerk.

41 *Assignments of Error.*

In the Supreme Court of the State of Texas, at Austin.

P. O. WEBER, Relator,
vs.
CHAS. ROGAN, Commissioner of the General Land Office, Respondent.
} Original Application in the Supreme Court of Texas for a Writ of Mandamus.

Assignments of error.

1. Now comes P. O. Weber, plaintiff in error, by his attorney, M. E. Kleberg, and says, that in the record and proceedings aforesaid, there is manifest error in the judgment and decision of the supreme court of Texas, to wit:

The supreme court of Texas erred in holding that section 26 of the act of the legislature of Texas of 1895 as amended by the act of 1897, known as art. 4218*y*, of the Revised Statutes of Texas invests the commissioner of the general land office of Texas with any discretion to accept or reject an offer of $1.00 per acre for the lands described in said section of the law; and in not holding that by said section, the law offers for sale all such isolated and detached sections of school land at the fixed price of $1.00 per acre, and that when said offer is accepted by any person, in the terms of the law, that the same constitutes a complete contract between such purchaser and the State of Texas, which the commissioner has no power or right to change, abridge or deny.

2. By sec. 26 of the act of the Texas legislature of 1895 as amended by the act of 1897 being art. 4218*y* of the Revised Statutes of Texas, the State of Texas offered to sell all isolated and detached sections and fractions of sections of public-school lands situated in counties organized prior to January 1875, except in the counties of Presidio, El Paso and Pecos, to any purchaser who would offer $1.00 per acre therefor, payable one-fortieth ($\frac{1}{40}$) cash and the balance in thirty-

nine equal installments with interest thereon at the rate of 3 %
42 per annum, and who would execute his obligation for such deferred payments. When this offer by the State was accepted as was done by the plaintiff in error in the case at bar, such acceptance, as had been theretofore held in former decisions by the supreme court of Texas, constituted a contract between the State and such purchaser; and it was error of the supreme court of the State of Texas to hold that the commissioner of its general land office might refuse to execute said contract by declining to award such purchaser the lands applied for; for by so holding the court gave to the statute an interpretation which violates the obligation of a contract and is repugnant to art. 1, sec. 10 of the Constitution of the United States forbidding the impairment of the obligation of contracts. For the reasons assigned, the said P. O. Weber prays that the judgment of the supreme court of Texas may be reversed, and that the above-styled cause may be remanded to said supreme court with directions to issue its writ of mandamus to Charles Rogan, commissioner of the general land office of the State of Texas instructing him forthwith to make an award of sale of the lands applied for, to plaintiff in error.

M. E. KLEBERG,
Attorney for Plaintiff in Error.

Endorsed: P. O. Weber *vs.* Chas. Rogan, commissioner. Assignments of error. Filed in supreme court of Texas April 15, 1901. Chas. S. Morse, clerk.

43 CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing forty-two pages contain a true and correct copy of all the proceedings had in the supreme court of the State of Texas in cause No. 838 entitled P. O. Weber, relator *vs.* Chas. Rogan, commissioner of the general land office of the State of Texas, respondent,—pages thirty-five, thirty-six and thirty-seven thereof being the original writ of error and the original allowance of writ of error.

Seal Supreme Court of the State of Texas.

Witness my hand and the seal of the supreme court of the State of Texas, at the city of Austin this, the 29th day of April A. D. 1901.

CHAS. S. MORSE, *Clerk.*

Endorsed on cover: File No. 18,180. Texas supreme court. Term No. 107. Paul O. Weber, plaintiff in error, *vs.* Charles Rogan, commissioner of the general land office of the State of Texas. Filed May 24", 1901.

14124

No. 107.

Supreme Court of the United States.

OCTOBER TERM, 1902.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

Paul O. Weber, plaintiff in error here, filed an original suit in the Supreme Court of the State of Texas, asking that said court in the exercise of its original jurisdiction, issue a writ of mandamus to Charles Rogan, the Commissioner of the General Land Office of Texas, directing said officer to award to plaintiff in error two isolated and detached sections of the

public school land, situated respectively in Polk and Jefferson Counties, in the State of Texas.

In his petition, plaintiff in error alleged:

That on the 11th day of August, 1899, he being desirous to purchase some public lands belonging to the Public School Fund of the State of Texas, and which said State, through its laws, had then offered for sale, applied to the Commissioner of the General Land Office of Texas, for the purchase of said lands at and for the price fixed by law for the same. That he fully complied with the terms of sale, offered by the law, authorizing him to purchase said lands from the State of Texas.

The lands are fully described, being a section of six hundred and Forty (640) Acres of land situated in Polk County, Texas, and a one-half (1-2) section of Three Hundred and twenty (320) acres in Jefferson County, Texas. It was further averred that the two (2) sections of land, at the time plaintiff in error made his application to purchase the same, belonged to the Public School Fund of the State of Texas, were detached and isolated from other public lands and were situated in counties organized prior to the first day of January, 1875, and not in the counties of El Paso, Presidio and Pecos. That in applying for the purchase of the aforesaid lands, he used the forms of application prepared for that purpose, by the Commissioner of the General Land Office together with the Attorney General of the State of Texas, as required by law, and filed his said application with the said Commissioner of the General Land Office, on the 11th day of August 1899, and appended to said application the affidavit required by law, and paid to the Treasurer of said State of Texas, the sum required by law to be paid to the State in the purchase of such character of lands; that he also filed with the said Commissioner of the General Land Office

his obligation payable to the State of Texas, for the balance of the purchase price required by law to be paid in 39 annual installments to the State with interest at the rate of Three per cent (3%) per annum. That all of said acts were done and performed in full and strict compliance with the law, providing for the sale of all isolated and detached sections and fractions of sections of land situated in counties organized prior to the first day of January 1875, other than the Counties of El Paso, Presidio and Pecos.

But that said Commissioner of the General Land Office rejected said applications for said land, and refused to award the same to plaintiff, in error, alleging as a pretended reason for his said refusal that the said two (2) sections of land had theretofore been classified, the first as timber land and the second as grazing land, and that the law was not applicable to grazing and timber land, but that sections and fractions of sections that are either classed as grazing or timber land could not be purchased under the law in force at the date of the application, made by plaintiff in error for one dollar ($1.00) per acre, although such grazing and timber lands were isolated and detached from other public lands and were situated in counties organized prior to the first day of January, 1875, and that the plaintiff in error having offered for said two (2) sections of land the price of one dollar ($1.00) per acre only, the said Commissioner of the General Land Office was without legal authority to award the said two (2) sections of land to the said plaintiff in error.

Plaintiff in error further averred it to be true that said two (2) sections of land, before and prior to the time that the same became isolated and detached, were classified by the Commissioner of the General Land Office, the one as timber land and the other as grazing, but that such classification from and after the time that the lands became isolated and

detached was no longer of any force or effect, because the provisions of the law in Texas requiring lands belonging to the Public School Fund to be classified, do not relate, or apply to isolated and detached sections or fractions of sections of such lands situated in counties organized prior to the first day of January, 1875; but that the price of such lands was fixed by law at One Dollar ($1.00) per acre, irrespective of any classification made of said lands, either before or after the time they became isolated and detached and that such classification was wholely useless and of no force and effect, and that by virtue of the acceptance by plaintiff in error of the terms of sale offered by the law itself, and by virtue of the filing of his application, affidavit and obligation with the Commissioner of the General Land Office, under the terms prescribed by the law and depositing with the Treasurer of the State of Texas, at the same time the several sums of money due the State of Texas for said lands, he became, in law, the purchaser of said two (2) sections of land, irrespective of said classification, and the Commissioner of the General Land Office was without legal authority to withhold from plaintiff in error, the award of said lands and that the rejection of his applications therefor by the said Commissioner was in violation of the law and clouded the title of plaintiff in error to said lands.

This petition was filed in the Supreme Court of the State of Texas on the 13th day of November, 1899, by order of court. (Rec., pp. 1, 2, 3.)

Charles Rogan, Commissioner of the General Land Office, defendant in error here ,filed his answer to this suit on January 8th, 1900. The answer contains some special demurrers, which however were disregarded by the Court, and are not material to this inquiry. In his answer he admitted plaintiff in error's applications for these lands, as averred in

the petition, and attached the same to his answer. He also admitted that the lands were isolated and detached and belonged to the Public School Fund of the State of Texas, and were situated in counties organized prior to the first day of January, 1875. That he refused to sell the section of land situated in Polk County, because the same was applied for at the price of One Dollar ($1.00) per acre, one-fortieth (1-40) cash, and the remainder payable in accordance with the requirements of the law, to be evidenced by written obligation, that said land is pine timbered land, and is of the actual value of not less than eight ($8.00) per acre, and that under the Act of 1897 it was classified as pine timbered land and valued at eight ($8.00) dollars per acre. That such classification and valuation were in strict conformity with the law, and were in full force and effect before and at the time the filing of the application by the plaintiff in error to purchase the same. That while said land was detached, it being in fact timbered land, he had no power to sell the same under article 4218y of the above Act of 1897. This being his construction of the law, he refused to award said land to the plaintiff in error on his said application; and he further alleged that if he was wrong in his construction of the law, then, nevertheless, no writ of mandamus should be issued against him, because the law gave him a discretion as to whether he would sell said land or not, which discretion could not be reviewed by the Court. He also alleged it would be inequitable and unjust to the State of Texas to compel the Commissioner of the General Land Office to award said land to the plaintiff in error, at the price of one dollar ($1.00) per acre, when the fair, reasonable market value of the same is not less than eight dollars ($8.00) per acre.

He further answered that he refused to sell the half (1-2) section of land situated in Jefferson County, upon the ap-

plication of plaintiff in error, because the same was grazing land and of the actual value of two dollars ($2.00) per acre, and said land was classified according to law as grazing land, and valued at two dollars ($2.00) per acre, and the classification on same was in strict conformity with the law and was in force and effect before and at the time of the filing of the application to purchase the same.

That while said land was detached, it being, as a matter of fact, grazing land and not agricultural land, he had no power to sell it under article 4218y of the Act of 1897. This being his construction of the law, he refused to award said land to plaintiff in error, on his said application. That if however the above construction of the law is wrong, the he averred that no writ of mandamus should be granted against him, for the said half (1-2) section of land, because the law gave him a discretion, as to whether he would sell said land or not, which discretion the Court had no right to to review. He further averred that it would be inequitable and unjust to the State of Texas to compel its Commissioner of the General Land Office, to award said land to plaintiff in error, at the price of One Dollar ($1.00) per acre, when the fair reasonable market value of same is not less than Two Dollars ($2.00) per acre. Respondent further averred that the said one-half (1-2) section of land had been lawfully classified and valued, under the Act of 1897 as watered grazing land, and valued at two dollars and half ($2.50) per acre. And on May 11th, 1897, said land, in accordance with said classification and valuation, was lawfully sold to one McHenry Winburn; that said sale was in all things valid and vested the title to said land in the said Winburn. That on July 20th, 1899, Winburn having failed to pay the annual interest to the State, his purchase of said land was forfeited. The respondent did not place said lands on the market for sale until the first day of September,

1899, on which day he placed the said land upon the market for sale as grazing land, and valued it at two dollars ($2.00) per acre. That on said day, in accordance with section six (6) of the Act of 1895, he notified in writing the County Clerk of Jefferson County, Texas, that said one-half (1-2) section of land was on the market for sale as grazing land, at the value of two dollars ($2.00) per acre. That until said notification was so sent to the County Clerk, the said land was not on the market for sale, and that when plaintiff in error made application to buy said land on August 11th, 1899, it was not on the market for sale, and by reason thereof, plaintiff in error had no right to buy it and acquired no rights thereto by his application to purchase the same. It was further contended in the answer that the attempted purchase of the lands, in the manner set forth in the petition of plaintiff in error, was illegal and void, because the applications to purchase said lands were not accompanied by affidavits to the effect that the applicant desired to purchase the lands for a home, and that he had in good faith settled thereon, as is required by section nine (9) of the Act of 1895. That under said law said lands can only be sold to settlers and that plaintiff in error, had not settled on either of said tracts of land, but was an actual resident of the City and County of Galveston, Texas.

That by reason of all of the matters stated in the answer; the attempted purchase of the land was absolutely null and void. (Rec., pp. 4 to 7.)

The application, affidavit and obligation are upon forms prepared for the purchase of detached lands, by the Commissioner of the General Land Office and the Attorney General of the State of Texas, and are fully set forth, on Pages 7 to 12 in the Transcript of the Record.

Upon these pleadings the conceded facts briefly stated and as found by the trial of court are substantially as follows:

On the 11th, day of August 1899, Paul O. Weber, plaintiff in error, upon forms furnished for that purpose, by the Commissoner of the General Land Office of the State of Texas, filed two (2) applications with that officer for the purchase, at the price of one dollar ($1.00) per acre of one whole section of land, and one-half (1-2) section of land belonging to the Public School Fund of the State of Texas, and situated in Counties organized prior to the first day of January 1875, and not in the counties of El Paso, Presidio or Pecos. He appended to his applications the affidavits required by law, paid one-fortieth (1-40) of the purchase price to the Treasurer of the State of Texas, and for the payment of the balance in thirty-nine (39) equal installments, with interest at the rate of three (3) per cent per annum, he executed and delivered his obligations in terms required by the laws of the State.

Both of said sections of land belonged to the class of public school lands, designated by the law, as isolated and detached sections or fractions of sections at the time plaintiff in error made his applications to purchase the same. Both sections of land, before they become a part of the class of public school lands, designated by law, as isolated and detached, and while yet a part of that class of public school lands, which is saleable to actual settlers only, had been classified by the Commissioner of the General Land Office—the one as pine timber land and valued at eight dollars ($8.00) per acre and the other as grazing land and valued at two dollars ($2.00) per acre.

The Commissioner refused to award the lands to the applicant, alleging as a reason for his refusal the following grounds:

1. Because the two (2) parcels of land having been classified respectively as timber and grazing land, and not as agricultural land, the law did not authorize him to sell them at the price of one dollar ($1.00) per acre.

2. That even if he was permitted to sell the land at the price of one dollar ($1.00) per acre, the law invested him with a discretion to accept or refuse such offer.

3. That it would be inequitable and unjust to the State to compel him to award said land for the price of one dollar ($1.00) per acre, when it had been appraised, respectively, at eight dollars ($8.00) and two dollars and a half ($2.50) per acre.

4. That the section designated as grazing land, in Jefferson County, had been sold by the State in 1897 to one Winburn, and that by reason of the failure of said purchaser to pay the annual interest his said purchase was declared forfeited, as required by law, and that thereupon the land reverted to the State. That since such forfeiture the land had not been placed on the market for resale, and hence it was not subject to purchase by anyone.

Upon these legal contentions issue was joined and the Supreme Court of Texas, upon briefs and oral arguments of both parties, on January 22d, 1900, held that plaintiff in eror was entitled to the award of the two (2) parcels of land and ordered that a writ of mandamus be issued, directing the Commissioner of the General Land Office to make the award.

The court delivered the following opinion:

P. O. WEBER, Relator,
vs.
CHARLES ROGAN, Commissioner, Respondent.
No. 838. Petition for Mandamus.

This is an original action for a writ of mandamus brought by the relator against the Commissioner of the Land Office to compel the respondent to award to the relator two parcels of school lands which he had made application to purchase. The allegations in the petition are not denied. From these allegations it appears that on the 11th day of August, 1899, the two tracts of land—one lying in Jefferson County, and

consiting of 320 acres, and the other situate in Polk County, and embracing 640 acres—were unappropriated public free school lands, and were "isolated and detached" within the meaning of the Act of May, 1897, with reference to the sale of the public free school lands; and that on that day the relator filed an application to purchase each of these parcels at the price of $1.00 per acre. Each of these applications was in due form and was accompanied by a tender of one-fortieth of the purchase money and by the relator's obligation for the payment of the balance as provided by the law then in force. It was also averred that the respondent had refused to award him the lands. The respondent for answer admits that the relator made application to purchase the lands, as averred by him in his petition, but avers in substance that under the law in force at the time applications were made the section in Polk County had been classified as timbered land, and had been appraised at $8.00 per acre, and also that the half section had been classified as grazing land and had been appraised at $2.50. He claimed that because they were not agricultural lands they were not subject to sale as "isolated and detached sections" under the law existing at the time applications were made. In regard to the latter tract, it was also averred that it had previously been sold, but that he, as Commissioner of the General Land Office, on the 20th day of July, 1899, had declared the title of the purchaser forfeited for non-payment of interest, and that he did not again place it upon the market until the 1st of September thereafter. He therefore claimed that at the time of the application that the tract last mentioned was not subject to sale, for the reason that it had not been again placed upon the market. The allegations of the answer were excepted to, but were not denied.

At the time applications to purchase were made, the following law was in force: "The Commissioner of the Gen-

eral Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter. (2 Batts' Rev. Stats, art. 4218y.)

The determination of the case before us depends upon the construction of this statute.

If by this law it is made the imperative duty of the Commismissioner of the General Land Office to sell all isolated sections and parts of sections of the public free school lands to the first applicant without regard to their classification, then the writ here applied for should be awarded; otherwise it should be denied.

Upon first impression we were inclined to the opinion that the provision in question was directory and not mandatory. We recognize the rule announced by the late Chief Justice Stayton, in Smisson vs. The State (71 Texas, 236), in the following language: "The word 'may' in the connection used in the sixteenth section was doubtless used in the sense of 'shall,' and therefore was mandatory. Such is the settled construction where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer,

unless the context shows that the word was used in its primary signification." The difficulty with the article is that the context tends in some degree to show that the word "may" in the last provision was used in its primary sense. The article begins by using the same word in the sense of permission, then it uses the word "shall"—an undoubted word of command--and then returns to the use of the word "may."

If we had nothing but the letter of the article to throw light upon the intention of the Legislature, we therefore think it would be difficult to say that the word "may" was not used in the same sense in the second instance as it was used in the first. But when we review the history of the provision, the difficulty disappears. The provision for the sale of "the isolated and detached" sections or parts of sections of the public free school lands first appeared as section 22 of the Act of April 1, 1887, in relation to the classification, lease and sale of the State's lands set apart for the benefit of the free schools, the university and the asylums of the State. That section reads as follows: "The Commissioner of the General Land Office, under the direction of the Governor, may withhold from lease any agricultural lands necessary for the purposes of settlement, or, in his discretion, he may lease such agricultural lands in small quantities for a less period than five years, as the public interest and development of the country may seem to require ;and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Pecos and Presidio Counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, at not less

than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe." This section was amended by section 26 of the Act of May 4, 1895, but so much thereof as related to the sale of detached sections was left unchanged. Section 26 appears in the Revised Statutes of 1895 as article 4218y. It was amended in 1897, and, as so amended, was the law in force at the time the relator applied for the purchase of the lands in controversy. It thus appears that until this article was amended by the act of 1897, the Commissioner had the discretion both as to the terms of the sale and as to the price, subject, however, to a minimum limit. The article so amended took away all discretion as to the terms of the sale by providing that the sale should be "upon the same terms as other public lands are sold under the provisions of this chapter."

(The chapter meant is chapter XII, A of title LXXXVII.) And it is very clear to our minds that if it had not been intended to take away all the discretion as to the price, the Legislature, instead of using the words "at one dollar per acre," would have said "at not less than one dollar per acre"—the form of expression used in the very article they were amending. By changing the language from the words "not less than two dollars per acre" to the words "at one dollar per acre," they must have intended not only to reduce the minimum to one dollar per acre, but also to fix the price at that sum. Such seems to have been the construction put upon the act by the next Legislature, for in 1899 the article was again amended so as to read, "at not less than one dollar," etc. (Laws of 1899, p. 235.) This last act had not gone into effect when the applications to purchase in this case were made.

It is to be observed that the provision in question only applied to lands lying in counties which had been organized before January 1st, 1875. Isolated sections and parts of sec-

tions of such lands had long been upon the market when the act which embraced this provision was passed, and had remained unsold. The presumption was that they were of little value and not marketable under the general provisions of the act. They were like the unsold remnants of a stock of merchandise—not sold because not saleable upon the terms and conditions upon which the bulk of the stock had been sold. This consideration doubtless impelled the Legislature to enact the special provision for the sale of detached lands. Therefore, in the original act, they removed all restrictions save as to a minimum price, and provided that such lands should be sold at such price not below $2.00 per acre, and upon such terms as the Commission of the Land Office might prescribe. It was ten years after the passage of the first act which conferred this power upon the Commissioner that the amendment was passed which was in force when the relator made application to purchase the lands in controversy in this case. The consideration which led to the first action of the Legislature bore with greater force at the time the amendment was adopted. The Legislature doubtless then felt that the previous law had been inadequate for the disposition of these remnants of public free school lands, and that to effect a sale it was necessary not only to lower but to fix the price, and take away all discretion in the premises from the Commissioner. The history of the legislation and the circumstances surrounding its subject-matter impel to the conclusion that the purpose of the Twenty-fifth Legislature, in passing the amendment of 1897, was to make it the duty of the Commissioner of the General Land Office to accept all bids for isolated sections and parts of sections of the school lands at $1.00 per acre, upon the purchasers tendering the part of the purchase money and the obligation for the balance, as was required by the general law.

But it is urgently contended that the provision applies only to agricultural lands, and that since the parcels in question have been classified, the one as timbered and the other as grazing lands, the relator acquired no right by his applications. This contention is based upon the fact that the first provision in the article is expressly applicable to agricultural lands. The argument is that this shows that in adopting the article in question, the Legislature had in mind only the agricultural lands, and that therefore the words "all sections and fractions of sections" meant all sections and fractional sections of agricultural lands. We can not concur in the proposition. We attach no importance to the fact that the provision about agricultural lands and that about detached parcels are found in the section of the law. It is undoubtedly the custom to embrace provisions relating to divers matters in the same section or article of a statute, and there can be no objection to the practice provided all relate to the same general subject named in the title of the act. In the provision in controversy, the Legislature says, "all sections and fractions of sections," and the words mean literally all such sections and fractions, without regard to their classification as agricultural, grazing or timbered lands. We think they meant what they said. In the original act, the section which contains the provision as to isolated and detached lands is nearly the last. The previous twenty-one sections contained full regulations for the sale and lease of the free school and asylum lands. When this was done, there remained certain exceptions to be provided. The Constitution required the lands to be sold, and hence it was deemed proper to authorize such of them to be held for sale as were in immediate demand for actual settlement. Also, as has been previously shown, in order to effect a sale of "isolated and detached sections and fractions of sections" of the lands, it

was expedient to except them from the general rule and to make special provision for the sale thereof. Not only was there no incongruity in providing for both of these exceptions in one section, but it seems to us that it was a natural and logical method of making the provisions. In the original section perhaps the most important provision in regard to the isolated lands is that any person, not a corporation, could be a purchaser. All other lands were to be sold to actual settlers only. Surely the lands most desirable for settlement and most likely to be applied for by actual settlers were those adapted to the purposes of agriculture. It therefore seems to us that if the Legislature had desired to except either class from the operation of the provision, the agricultural lands are the last they would have excepted, for so far as we can see every consideration which impelled them to except the isolated and detached sections from the general rule laid down by the statute applied with more force to the timbered and grazing lands than to the agricultural sections.

But as to the half section situate in Jefferson County there is another question to be determined. After the Commissioner had declared that parcel forfeited, was it necessary that the forfeiture should be reported to the County Clerk of the county in which the land is situate before it was again subject to purchase? The provisions in general of the chapter regulating the sale of the public school and asylum lands do not apply to the "isolated and detached sections and fractions of sections." As already seen, they required no classification, nor was any appraisement necessary as a condition precedent to their sale. Before the amendment of 1897, the Commissioner fixed the price at not less than $2.00 per acre. Under that amendment, the law fixed it absolutely at $1.00, and directed that the lands should be sold upon the same terms as other public lands were sold, under the provisions of the

chapter of which it was made a part. By "terms" are meant the times of the payment of the installments of the purchase money and the rate of interest on the deferred payments. It does not mean under the same regulations, because, as we have seen, no regulations were necessary. The law having fixed the price and terms of sale, all that was necessary to acquire an inchoate title was to make application to the Commissioner and to tender the proportion of the purchase money required by the law to be paid in cash, together with the statutory obligation for the balance. (Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 5.)

We think the writ of mandamus should issue as prayed for, and it is accordingly so ordered.

R. R. GAINES, Chief Justice.

(Rec., pp. 12-18.)

On February 3d, 1900, the respondent filed a motion for new trial, called motion for rehearing in the Supreme Court of Texas, and on the 8th of March, 1900, the court rendered the following opinion, granting said motion: (Rec., pp. 18-20.)

Opinion Granting Motion for Rehearing.

P. O. WEBER, Relator,
vs.
CHARLES ROGAN, Commissioner, Respondent.
} No. 740. Petition for Mandamus.

The motion and argument for a rehearing contains much matter which would have been very properly addressed to the Legislature while it had under consideration the statute which gave rise to this suit, but which is hardly proper to address to a court which is called upon to construe the law. If there was any provision of the Constitution which prohibits the Legislature from passing improvident laws, we would most likely be amply justified in disregarding the law in question.

However, the motion calls our attention to certain provisions of the Revised Statutes in relation to the sale of timber upon the school lands and the timber land themselves, which are claimed to be inconsistent with the idea that the article in reference to "isolated and detached" sections was intended to apply to the timbered lands. This presents a point which was not presented upon the argument at the hearing, and upon which further argument is appropriate. The motion for a rehearing is therefore granted, and the cause will be set down for argument upon such day as may be agreed upon by the parties, with the consent of the court.

R. R. GAINES, Chief Justice.

Judgment Granting Motion for Rehearing.

P. O. WEBER, Relator, vs. CHARLES ROGAN, Commissioner, Respondent.	Motion No. 740. Petition for Mandamus.

Opinion delivered by Chief Justice Gaines:

In this cause it is ordered that the motion of the respondent for a rehearing be granted, that the judgment heretofore entered on January 22d, 1900, be set aside and the cause be set down for argument on point indicated in the opinion this day filed, for some day to be agreed upon by counsel, with the consent of the court. (Rec., pp. 19, 20.)

The case was again argued and resubmitted, and on June 28th, 1900, the court rendered the following opinion, refusing the writ of mandamus:

P. O. WEBER, Relator, vs. CHARLES ROGAN, Commissioner, Respondent.	No. 838. Petition for Mandamus.

The argument for the respondent, upon the second submission of this case, has placed the matter in a new light, and

has led us to the conclusion that our former judgment was erroneous and that the writ of mandamus should be denied.

Our opinion is, that even if it be held that article 4218y applies to all lands alike, and if it takes away the discretion of the Commissioner of the General Land Office to refuse a bid of $1.00 per acre, yet the relator can not have a judgment in this case as to the timbered section. That article prescribes that the lands therein designated shall be sold "upon the same terms as other public lands are sold under the provisions of this chapter." There are no provisions in the chapter mentioned which are applicable to all lands alike . Timbered lands are to be sold for cash and agricultural and pasture lands upon a long credit. So that, if the timbered sections be included in the article under consideration, the provision quoted admits of no reasonable construction save that the timbered sections are required to be sold as other timbered lands are authorized to be sold, under the provisions of the chapter, and the agricultural and pasture lands are to be sold as is provided in other articles for the sale of such lands; that is to say, the former for cash and the latter in equal annual installments extending over many years. This seems to us to be fatal in any event to the claim of the relator to the timbered section. If he had the absolute right to purchase the timbered section at $1.00 per acre, he could in no event have perfected his right to that land except by tendering the purchase money in full. This he did not do.

But as to the half section of pasture land, the case is different. Under the statute the pasture lands are saleable upon the same general terms as agricultural lands; and the relator having tendered one-fortieth of the purchase money and his obligation for the payment of the thirty-nine additional annual installments, as required by the statute for the sale of such lands, was entitled to have the land awarded to him, provided

the respondent was absolutely required to sell the land at $1.00 per acre. Therefore our conclusion as to the timbered section does not relieve us from the duty of reviewing our opinion upon the more important question and of determining whether or not the Commissioner, under article 4218y, had a discretion to refuse an offer of $1.00 per acre for sections of land which were isolated and detached.

In our former opinion, we held in effect that the fact that the article under construction omitted the words "not less than" from section 22 of the Act of April 1, 1887, of which such article was an amendment, and for which it was a substitute, led to the conclusion that the purpose was to take from the Commissioner of the General Land Office the discretion with which he was previously invested to refuse the minimum price. The majority of the court are now of the opinion that we erred in that conclusion. The rule is recognized that in the construction of statutes the history of previous legislation upon the subject should be considered, and that a change of language of a statute by the omission or addition of one or more words should ordinarily be presumed to have been made for a purpose. But the one controlling and effective rule of construction is that the intent of the Legislature must govern. Every other recognized rule is subsidiary to this fandamental canon of construction, and must yield when it is believed that its application would lead to a result contrary to that which the Legislature actually intended. While the omission of the words "not less than" in the article we are considering tends to show that it was the intention of the Legislature to deprive the Commissioner of the power of fixing the price of isolated sections, it is not necessarily conclusive of that question. As indicated in our former opinion, if article 4218y of the Act of 1887 had been the first provision upon the subject of the sale of isolated sections of the free

school lands, we should have felt constrained to hold that the word "may," as there used, was employed in the sense of permission and not of command, and this notwithstanding the well recognized rule announced in the case of Smisson vs. The State, there cited. Though it is a matter "in which the public have an interest to be * * * promoted by the exercise of a power * * * by a public officer," and though in such a case it is the ordinary rule to construe "may" as meaning "shall," yet we thought that the context indicated that such was not the purpose. Such being the case, it is not unreasonable to presume that the Legislature may have intended to use the word "may" in the ordinary sense of permission, and have demed it unnecessary to retain the words which were omitted in the former act. In that act, the word in question could not have been employed as a word of command, for the reason that by other terms employed, the officer was empowered to reject any offer in the event he deemed the price offered less than the value of the land.

Now it is to be noted that in every statute that has been passed which provides for the sale of the public lands, from the year 1883 down to the passage of the article under consideration, especial provision has been made for the sale of those which are chiefly valuable for the timber upon them. The Act of April 12th, 1883, provided that such lands should not be sold at less than $5.00 per acre, while other lands without water upon them were saleable at a minimum price of $2.00, and those with water at $3.00 per acre. (Laws of 1883, p. 85.) Substantially the same provision is found in section 7 of the Act of April 1, 1887. (Laws of 1887, p. 85.) That act also provides in substance that timbered lands shall be paid for in cash. The sections which contained these provisions were not amended by the Act of April 8th, 1889 (Laws of 1889, p. 50), nor by that of April 29th, 1891. (Laws of 1891, p. 180.)

By the Act of April, 1895, the minimum price of agricultural lands was reduced to $2.00, and that of pasture lands to $1.00 per acre; but the minimum price of timbered land was left at $5.00, as previously fixed. This act also retained the provision that such lands should be sold for cash only. (Laws of 1895, p. 61.) It also added the following section: "Section 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than $5.00 per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or parts of sections at its proper value; provided such timber is sold at not less than $2.00 per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications made by the Land Commissioner. Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at $2.00 per acre cash at any time before the expiration of five years from date of purchase of timber under the provisions of this act."

All these provisions in relation to the sale of timbered lands and of the timber thereon were retained in the Act of May, 1897, of which article 4218y constitutes a part. Now, conceding, for the purposes of the argument, that the previous laws

in regard to the sale of the detached sections applied to pasture and timbered lands as well as to agricultural lands, such provisions are not inconsistent with the previous policy of the law in relation to timbered land as shown by our legislation upon the subject for the reason that before the Act of 1897, the Commissioner was not bound to sell at a fixed sum, but had the liberty to refuse any offer which in his opinion was less than the value of the land. Rare instances might exist in which a tract might not be worth more than the minimum fixed by the act. In such cases, he was empowered to sell at that price; but it was not to be presumed that he would sell any land at less than its actual value. But to say that it was the intention of the Legislature in making the amendment not only to reduce the minimum price of the isolated sections one-half of what it had been under the previous law, but also to deprive the Commissioner of all discretion and to make it his absolute duty to sell at that price, is to attribute to them a purpose to make a radical departure from the previous course of legislation upon the subject and to attach a value to detached sections of timbered lands in no degree consistent with the value fixed by them and other Legislatures upon timbered lands when not detached.

What may be the actual value of these detached lands we do not know; nor have we the means of ascertaining their value. It appears, however, in this case, that the timbered section in controversy had been lawfully appraised at $8.00 per acre; and from this the presumption may be indulged that there were other sections which had been appraised at more, and which were worth much more than $1.00 per acre. Under these circumstances to hold that the Legislature intended to force the sale of these detached sections merely because they were detached at 20 per cent of the price put upon timbered lands generally is to attribute to them a degree of improvi-

dence which ought not to be imputed when the language of the statute admits of any other reasonable construction.

For these reasons the majority of the court are of the opinion that the word "may" in article 4218y of the Revised Statutes ought to be construed in its literal sense—that is to say, as a word merely conferring a power upon the Commissioner to sell the lands therein specified at $1.00 per acre, and not making it obligatory upon him to do so. I incline to our former opinion, but am also inclined to concur in the result, but upon a different ground. But since my views are not those of the majority of the court, it would serve no useful purpose to express them here.

The writ of mandamus is denied.

R. R. GAINES, Chief Justice.

(Rec., pp. 21-24.)

On July 11th, 1900, plaintiff in error filed his motion for new trial, styled "Motion for Rehearing in the Supreme Court of Texas," in which he set forth various grounds to show the error of the court in the conclusions reached by it, and among which was the following:

By article 4218y of the Act of 1897, the State of Texas offers to sell all isolated and detached sections and fractions of sections of public school land situated in counties organized prior to January, 1875, except in the counties of Presidio, El Paso and Pecos, to any purchaser who will offer $1.00 per acre therefor, payable one-fortieth cash and the balance in forty equal settlements, with interest thereon at the rate of 3 per cent per annum, and who will execute his obligation for the deferred payments. Whenever this offer by the State is accepted it becomes an executory contract between the State and such purchaser. It was error of this court therefore to hold that the Commissioner of the General Land Office might refuse to execute this contract by declining to award such

purchaser the lands applied for, for by so holding the court gives to the statute an interpretation which violates the obligation of this contract and is repugnant to article 1, section 10, of the Constitution of the United States, forbidding the impairment of the obligation of contracts. (Rec., pp. 25-29.)

This motion was considered by the Supreme Court of Texas, and on the 18th of October the court entered an order that said motion be overruled. (Rec., p. 29.)

Assignments of Error.

1. Now comes P. O. Weber, plaintiff in error, by his attorney, M. E. Kleberg, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the Supreme Court of Texas, to wit:

The Supreme Court of Texas erred in holding that section 26 of the Act of the Legislature of Texas of 1895, as amended by the Act of 1897, known as article 4218y of the Revised Statutes of Texas, invests the Commissioner of the General Land Office of Texas with any discretion to accept or reject an offer of $1.00 per acre for the lands described in said section of the law; and in not holding that by said section the law offers for sale all such isolated and detached sections of school land at the fixed price of $1.00 per acre, and that when the said offer is accepted by any person, in the terms of the law, that the same constitutes a complete contract between such purchaser and the State of Texas, which the Commissioner has no power or right to change, abridge or deny.

2. By section 26 of the Act of the Texas Legislature of 1895, as amended by the Act of 1897, being article 4218y of the Revised Statutes of Texas, the State of Texas offered to sell all isolated and detached sections and fractions of sections of public school lands situated in counties organized prior to January, 1875, except in the counties of Presidio, El Paso

and Pecos, to any purchaser who would offer $1.00 per acre therefor, payable one-fortieth (1-40) cash and the balance in thirty-nine equal installments, with interest thereon at the rate of 3 per cent per annum, and who would execute his obligation for such deferred payments. When this offer by the State was accepted, as was done by the plaintiff in error in the case at bar, such acceptance, as had been theretofore held in former decisions by the Supreme Court of Texas, constituted a contract between the State and such purchaser; and it was error of the Supreme Court of the State of Texas to hold that the Commissioner of the General Land Office might refuse to execute said contract by declining to award such purchaser the lands applied for; for by so holding the court gave to the statute an interpretation which violates the obligation of a contract, and is repugnant to article 1, section 10, of the Constitution of the United States forbidding the impairment of the obligation of contracts. For the reasons assigned the said P. O. Weber prays that the judgment of the Supreme Court of Texas be reversed, and that the above-styled cause may be remanded to said Supreme Court with directions to issue its writ of mandamus to Charles Rogan, Commissioner of the General Land Office of the State of Texas, instructing him forthwith to make an award of sale of the lands applied for to plaintiff in error.

The questions arising in this case may be briefly stated as follows:

1. Does the case involve a Federal question so as to give this court jurisdiction to review the decision and judgment of the Supreme Court of Texas?

2. If such Federal question exists, does the record show that it was properly raised, and that it was decided adversely to plaintiff in error?

3. Under the facts of the case and the law applicable thereto, was plaintiff in error entitled to a writ of mandamus, directing the Commissioner of the General Land Office of the State of Texas to make an award to him of the two sections of land which he sought to purchase?

BRIEF OF ARGUMENT.

Does the case present a Federal question?

By section 4 of article 7, of the Constitution of the State of Texas of 1876, in force since the 18th day of April, 1876, it is provided that all public lands set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms, as may be prescribed by law. Under this authority the Legislature, by various acts, provided for the sale of the public free school lands, all of which acts, however, were superceded by the Act of 1887, which provided an elaborate system for selling all of the public school lands of the State. (Gen. Laws of Texas of 1877, p. 84 et seq.)

The Act of 1887, just cited, was repealed by the Act of 1895. (General Laws of the State of Texas of 1895, pp. 63 et seq.)

But the latter act retained the general system of the Act of 1887, requiring the sale of the lands.

This system so far as the same is material to the present inquiry is substantially as follows:

Any person desiring to purchase public school lands is required to forward his application to the Commissioner of the General Land Office describing the land sought to be purchased, and to accompany the same with his affidavit stating in effect that he desires to purchase the land for a home, and has in good faith settled thereon; that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. The pur-

chaser shall transmit to the Treasurer of the State one-fortieth of the actual purchase money due for the land purchased by him, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay the balance of the purchase money in thirty-nine equal annual installments, with interest thereon at the rate of 3 per cent per annum. Upon receipt of one-fortieth of the purchase money by the Treasurer and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and application are filed in the General Land Office. (Sec. 9, Acts of 1895, pp. 65. See appendix of this Brief.)

The forms of application, affidavit and obligation to be used by any purchaser desiring to buy lands are required to be prepared by the Commissioner of the General Land Office and by the Attorney General of Texas. (Sec. 2, Acts of 1895, p. 63. See appendix of this Brief.)

In the event the land sought to be purchased is situated in counties organized prior to the 1st day of January, 1875, and is detached and isolated from other public lands, the affidavit of the purchaser is not required to state that he desired to buy the lands for the purpose of a home, but only that he is buying the land for his own use, and not for any other person or corporation. (Rec., pp. 7, 10; Sayles' Real Estate Laws Vol. 1, pp. 405-408, art. 412.)

Public school lands, except such as are detached and issolated are saleable to actual settlers only on terms fixed by the statutes.

Section 26 of the Act of 1895 provides that all sections or fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Pecos and Presidio Counties, which sections are detached and isolated from other

public lands, may be sold to any purchaser, except to a corpotion, without actual settlement, at not less than $2.00 per acre, upon such terms as the Commissioner of the General Land Office may prescribe. (Sec. 26, Act of 1895. See appendix of this brief.) The Act of 1895 was transferred by the codifiers to the Revised Statutes of Texas of 1895, and section 26 thereof appears therein as article 4218y. Article 4218y of the Revised Statutes was amended by the Act of 1897 to read as follows:

All sections and fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at $1.00 per acre, upon the same terms as other public lands are sold under the provision of this chapter. (General Laws of Texas of 1897, p. 187.)

This amendment made two important changes regarding the sale of detached and isolated lands:

1. The lands were required to be sold to any purchaser except a corporation at the fixed price of $1.00.

2. The terms of sale were the same as those upon which other public land was sold, and not such as the Commissioner of the General Land Office might prescribe.

While this law was in force plaintiff in error made his application to purchase the land described in his petition. (Rec., pp. 7, 10.)

The Act of 1897, amending article 4218y of the Revised Statutes of Texas, was again amended by the Act of 1899, so as to read as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if,

in the judgment of the Commissioner, they may be in immediate demand for settlement; but such lands shall be held for settlement and sold to actual settlers only under the provisions of this chapter; and all surveys and fractions of surveys in all counties organized prior to the 1st day of January, 1875, which surveys are isolated and detached from other surveyed school lands, may be sold to any purchaser, except to a corporation, without actual settlement at not less than $1.00 per acre, upon the same terms as other public lands are sold under the provisions of chapter 129 of the Acts of 1897.

"Section 2. The fact that a great deal of the lands mentioned herein are valuable, and the present law would seem to prevent the sales of them for more than $1.00 per acre, except in cases of voluntary offer, to the detriment of the school fund, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted." (General Laws of Texas of 1899, p. 235.)

It thus appears that by the Act of 1895 detached and isolated school lands might be sold by the Commissioner of the General Land Office at not less than $2.00 per acre. So, too, was the law providing for the sale of these particular kind of school lands under the Act of 1887. **(Sec. 22 of the Act of 1887, General Laws of Texas, p. 84.)**

The terms upon which these lands were to be sold were entirely in the discretion of the Commissioner of the General Land Office, that officer being invested with full power to prescribe any terms he might see fit.

Then came the Act of 1897, by which the law governing the sale of isolated and detached school lands was most materially changed.

In the first place the provision of the former law which required that such land should not be sold at less than $2.00 per acre was so changed so as to direct them to be sold at the fixed price of $1.00 per acre. The minimum price fixed by the former law was entirely abolished, and the absolute price of $1.00 per acre was placed upon the lands by the law, so that no discretion was left to the Commissioner to fix the price upon this class of lands. The law itself fixed the price at $1.00 per acre.

In the second place, the Commissioner was deprived of all and every discretion in fixing the terms upon which this land should be sold. The former law provided that the sale should be upon such terms as the Commissioner of the General Land Office might prescribe. The amendment took away this discretion from the Commissioner and provided that the sale should be upon the same terms as other public lands are sold.

While the provisions of the Act of 1897 making the aforesaid important changes in the sale of detached and isolated lands were yet in force, plaintiff in error made his application to the Commissioner of the General Land Office for the purchase of the two tracts of land described in his petition.

It is admitted that the application was in due form; in fact was made upon a form prepared by the Commissioner and Attorney General. It is also admitted that the affidavit and obligation required by law were duly executed and filed with the Commissioner of the General Land Office as the law required, and that one-fortieth of the purchase money was promptly paid to the Treasurer of the State of Texas. In other words, all the conditions of the law were fulfilled, and the purchaser was entitled to an award of the lands unless the Commissioner was invested with a discretion to refuse the award.

In the first opinion rendered by the Supreme Court of Texas upon this point it was held that the plaintiff in error having complied with the terms of the law was entitled to have the lands in question awarded to him. That the Legislature intended by Act of 1897 to so amend the former laws upon this subject as to deprive the Commissioner of any discretion whatever.

That the law itself made an offer to sell isolated and detached lands to any person who agreed to pay therefor the price of $1.00 per acre and execute the affidavit and obligation which the law required in the sale of those school lands which were not isolated and detached, and were devoted to actual settlers only, and that whenever a person agreed to pay said price and executed said affidavit and obligation the contract between him and the State of Texas was complete and might not be violated by the Commissioner of the General Land Office, or any one else. To make clear that such was the meaning of the law the court in its opinion cited the Act of 1899, by which the "Act of 1897 was so changed as to require isolated and detached lands to be sold **at not less** than $1.00 per acre. (See opinion of Supreme Court of Texas, Rec., pp. 12-17.)

By its second opinion the Supreme Court of Texas modifies its first opinion and holds (at least so far as the grazing section of land is concerned) that the Act of 1897 means the same as the Act of 1899, which amended and changed it, and by so holding gives to Act of 1899 a retroactive effect so as to make it violative of the contract made by the plaintiff in error under the Act of 1897 with the State of Texas, by which contract he was entitled to an award of the lands which he purchased.

The Supreme Court of Texas therefore by its judgment under its last opinion gives effect to the subsequent statute

before it was in force, and thereby impairs the contract which plaintiff had made under the former law for the purchase of the lands for which he seeks an award.

It is urged that this court has no jurisdiction of this case for the reason that the Supreme Court of Texas in its last opinion does not consider the subsequent legislation by the State with the view of impairing the contract made under the Act of 1897, but limits itself to a consideration of that act and holds that because of a discretion vested in the Commissioner to reject applications for the purchase of this class of lands, no contract existed with plaintiff in error.

Now we understand the true principle of law to be that if the judgment of the state court gives no effect to the subsequent law of the State, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract.

Now it is true that the Supreme Court of Texas in its first opinion refers to the amending Act of 1899 only once to show the true meaning of the Act of 1897 and the change which was intended to be made by the Act of 1899, and places its decision in its last opinion distinctly on the ground that no contract existed between plaintiff in error and the State, notwithstanding his compliance with all the requirements of the statute. But at the same time it would appear to be equally clear that the judgment of the Supreme Court of Texas under its last opinion gives effect to the subsequent statute —a retroactive effect—whereby plaintiff in error's contract was violated, and it has been repeatedly held by this court that in reviewing the judgment of a state court it is not limited to a mere consideration of the language used in the opinion of the State Court, but may examine and determine what is the real substance and effect of the decision, and should this court

find that the effect of such decision is to give such force to subsequent legislation as to impair contracts made under former legislation, then a Federal question is presented, of which this court will take jurisdiction. (**McCullough vs Virginia, 172 U. S., pp. 102, 116, 117; Houston & Texas Central R. R. Co. vs. Texas, 177 U. S., p. 74.**)

We submit therefore that under the principles announced in the foregoing cases this court has jurisdiction in the case at bar.

Does the record show that the Federal question was properly raised and that it was decided adversely to plaintiff in error?

It must be remembered that this case was one of original and final jurisdiction in the Supreme Court of Texas, in so far as the courts of this State are concerned. Such is the recognized law of the State of Texas. (**Pickle vs. McCall, 86 Texas, p. 212.**)

In his petition for a writ of mandamus against the Commissioner of the General Land Office, plaintiff in error distinctly alleges and asserts that by virtue of his acceptance of the terms and price for which by law the lands in question were offered for sale, and by virtue of the filing of his application, affidavit and obligation with the Commissioner of the General Land Office under the terms prescribed by the law and the payment by him to the State Treasurer at the same time of the several sums of money due the State of Texas for the lands, he became in law the purchaser of said two sections of land, and that the Commissioner of the General Land Office was without authority to withhold from him an award therefor. (**Rec., pp. 2, 3.**)

Upon this petition and the answer of defendant in error the Supreme Court of Texas held the plaintiff in error was correct in his contention, and directed that the writ of mandamus be

issued commanding the Commissioner to award the lands. **(Rec., pp. 12 to 17.)**

Within the time allowed by the rules of the court, defendant in error filed a motion for rehearing. **(Rec., p. 19.)** This motion was granted by the court, at least as far as the timber section of land is concerned. **(Rec., pp. 12, 22.)**

Upon re-argument this court delivered a second opinion, by which it modified its first opinion by holding that plaintiff in error had not complied with the law in his offer for the timber section, and for that reason was not entitled to have an award therefor. That as to the grazing section his offer was in compliance with the statute, and that he was entitled to have said section awarded unless the Commissioner of the General Land Office was by law invested with a discretion to refuse the award if he so desired.

Upon the latter point the court concluded that the Commissioner had such discretion, and for that reason his refusal to make the award was not subject to judicial review. For these reasons the writ of mandamus was denied. **(Rec., pp. 21 to 24.)**

Thereupon plaintiff in error filed his motion to set aside said second opinion and the judgment thereunder, and to grant a new hearing, setting forth specifically the grounds for such a rehearing, one of which was that the court in its second opinion, and the judgment thereunder, gave to the statutes an interpretation which impaired the obligation of a contract existing between plaintiff in error and the State of Texas, and which contract was made by the acceptance by plaintiff in error of the offer for sale made by the State of the lands in question, and complying with the terms of said offer. **(Rec., p. 29.)**

It will be observed that the judgment refusing the writ of mandamus, rendered by the Supreme Court of Texas under its second opinion, was the first time that plaintiff in error had

grounds to complain of the action of the court, and that by his motion to correct said judgment he promptly pleaded his right to have his contract with the State of Texas protected by the Federal Constitution.

This motion coming on to be heard, the court rendered thereon the following judgment: **(Rec., p. 29.)**

P. O. WEBER, Relator, vs. CHARLES ROGAN, Commissioner, Respondent.	No. 798. Petition for Mandamus

This day came on to be heard the motion of the relator for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; that the relator, P. O. Weber, pay all costs of this motion.

It thus appears that plaintiff in error raised the Federal question in the case at bar by his petition, as well as by motion at the first opportunity which presented itself, and as soon as the rulings of the court were adverse to him. It will also be seen that the line of decisions made in this court holding that a writ of error to a state court will not lie where the Federal question is raised for the first time in the appellate court by motion for rehearing, is not applicable to the case at bar, for the reason that in the trial and decision of the case at bar the Supreme Court of Texas was not an appellate court, but a court of original jurisdiction of the first instance, and that plaintiff in error could not anticipate a denial by that court of his rights under the Federal Constitution. Hence, as in any other trial court, when the judgment denied to him this right he promptly complained thereof by his motion to set aside this judgment. This motion the Supreme Court of Texas did not dismiss or refuse to consider, but as shown by its judgment thereon, heretofore cited, duly considered and then overruled. In other words, the Supreme Court of Texas having duly con-

sidered the motion of plaintiff in error wherein he complains that the contract existing between him and the State of Texas was impaired, decided against him. (**Mallett vs. North Carolina, 181 U. S., pp. 591, 592.**)

For the reasons herein stated and the principle announced in the case last cited, we believe the Federal question in this case was properly and timely raised and presented in the trial court and decided adversely to plaintiff in error.

Under the facts of the case and the law applicable thereto, was plaintiff in error entitled to a writ of mandamus directing the Commissioner of the General Land Office of the State of Texas to make an award to him of the two sections of land which he sought to purchase?

If this court concludes that it has jurisdiction to hear and determine this case, then it follows that it will determine for itself the proper construction of the Texas statutes in question.

"While it is undoubtedly the general rule of this court to accept the construction placed by the court of a State upon its statutes, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired." (**McCullough vs. Virginia, 172 U. S., pp. 109, 110,** and cases therein cited.)

We might content ourselves to rest the argument as to the proper construction of the statutes in question upon the first opinion delivered by the Supreme Court of Texas in this case, for it seems to us quite apparent, that by placing the two opinions in juxtaposition, the falsity of the reasoning in the second opinion becomes most evident.

We submit, however, the following considerations which we believe further support the grounds of the first opinion and judgment of the court:

By the Constitution of the State of 1876 the Legislature is required to pass laws providing for the sale of all public

school and asylum lands of the State of Texas. In pursuance of this authority and command various acts of the Legislature providing for the sale of these lands were passed. All of these, however, were repealed by the Act of 1887, hereinbefore cited. This act, besides providing for an elaborate system regulating the sale of the public school lands, for the first time contained a provision in the 22d section thereof which placed isolated and detached lands upon a different footing from the other public school lands.

While public school lands generally could be sold to actual settlers only in quantity not exceeding four sections as to pasture lands which were without water, and in quantities not exceeding one section as to timber and agricultural lands, isolated and detached lands might be sold to any person without actual settlement and irrespective of quantity. So, the actual settler is required to reside on the land he purchases for at least three consecutive years and to make proper proof of such residence before he can obtain title to the land, even though he had paid the entire purchase price. The price of the land to actual settlers was not to be less than $2.00 per acre, watered sections at not less than $3.00 per acre, and timbered lands at not less than $5.00 per acre.

The law further provides that upon forms prepared by the officers of the State the purchaser shall apply for the lands he desires to buy and make the affidavit to which we have heretofore called attention. He shall pay one-fortieth of the purchase price to the State Treasurer, and execute his obligation to the State for the balance of the purchase money in thirty-nine equal annual installments, bearing interest at the rate of 3 per cent per annum. When he has made this payment to the Treasurer and filed this affidavit and obligation with the Commissioner, his contract is complete and the Commissioner must make an award to him, and is wholly without discre-

tion to refuse to do so. **(Sec. 9 of the Act of 1887, General Laws of Texas.)**

Section 22 of this act reads as follows:

"The Commissioner of the General Land Office, under the direction of the Governor, may withhold from lease any agricultural lands necessary for purposes of settlement, or in his discretion, he may lease such agricultural lands in small quantities for a less period than five years, as the public interest and development of the country may seem to require; and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio Counties, which section are detached and isolated from other public lands, may be sold to any purchaser except to a corporation at not less than $2.00 per acre, upon such terms as the Commissioner of the General Land Office may prescribe."

It will thus be seen that this section of the act grafts an exception upon the general system in so far as the sale of isolated and detached lands is concerned. They are to be sold at not less than $2.00 per acre, upon such terms as the Commissioner of the General Land Office may prescribe; that is to say, that officer may sell the land for cash or part cash and part credit or credit alone for such time as he may see fit.

The Act of 1887 was entirely repealed by the Act of 1895, but the particular provisions which are under construction in this case are the same in both acts, and the Act of 1895, which will be found in full in an appendix to this Brief, in the 26th section thereof, re-enacts sections 22 of the Act of 1887, and

adds thereto the words "without actual settlement." The Act of 1895 was transferred to the "Revised Statutes of Texas, and section 26 thereof appears as article 4218y in said Revised Statutes.

The law thus stood unchanged until 1897, when various amendments to the Act of 1895 were enacted by the Legislature of Texas, and article 4218y of said act was amended so as to read as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at $1.00 per acre, upon the same terms as other public lands are sold under the provisions of this chapter."

The changes made by this amendment are most obvious. The price of isolated and detached lands is no longer to be left to the discretion of the Commissioner, but is fixed at $1.00 per acre, and any purchaser may buy at that price, though not an actual settler, and the Commissioner must sell to him if he offers the price and terms provided by law. The terms are no longer to be such as the Commissioner may prescribe, but are to be the same as those provided for other public school lands by the provisions of the Act of 1895. It is plain, therefore, that by this amendment the Commissioner was deprived of any discretion in the sale of these lands, and was

charged with the simple ministerial duty of making the award to the purchaser when he paid one-fortieth of the purchase price of $1.00 per acre, and gave his obligation to pay the balance of the purchase money in thirty-nine equal installments, with interest thereon at the rate of 3 per cent per annum. And it was so held by the Supreme Court of Texas in its first opinion rendered in this cause, and up to that time the Courts of Civil Appeals in Texas in cases where their jurisdiction was final, had so construed these statutes.

One of the first cases in which the power of the Commissioner in regard to the sale of school lands generally was discussed is that of Metzler vs. Johnson (1 C. C. A., 139), in which Judge Head, delivering the opinion of the court, says:

"It will thus be seen that while by the terms of the law the Commissioner is to make the sale, yet there is nothing in fact to be done by him save receiving the application, affidavit and obligation of the proposed purchaser. He is nowhere given discretion to accept or reject these papers. The sale is really made by the purchaser accepting the proposition made by the law."

Again, in the case of Watts vs. Wheeler (10 C. C. A., 119), the same justice delivering the opinion of the court upon the construction of the statute regulating the sale and lease of public school lands, aptly remarks:

"If appellee had the right to make the purchase, and complied with the law in his attempt to do so, we do not think that the act of the Commissioner in refusing to award him the land should deprive him thereof. In making these sales, the Commissioner does not seem to have been clothed with discretion to accept or reject applications.

"The offer is made by the law to all alike, and when its terms are accepted the contract is complete."

The principle announced in the above case is approved by

the Supreme Court of Texas in **Jumbo Cattle Company vs. Bacon & Graves (79 Texas, 5)**, where it is said:

"In so far as mere property rights are concerned, we see no difference between the contract of a State and an individual, and a contract between two individuals. When there is an offer made by an act of the Legislature, which is accepted by an individual, there is a contract which it is not within the power of the State to impair."

In the second and last opinion of the Supreme Court of Texas in the case at bar (Rec., pp. 21 to 24), the majority of the court denies the existence of any contract between plaintiff in error and the State, and holds so far as the grazing section involved in this case is concerned, that although plaintiff in error complied in every particular with the statutes in his application for the purchase of said land in the payment of the cash part of the purchase money to the State Treasurer, the obligation he executed to the State and the affidavit required by law, that yet his contract with the State was not complete until the acceptance thereof by the Commissioner of the General Land Office, and that that officer might in his discretion refuse acceptance of the contract tendered him by the plaintiff in error.

The court, in construing article 4218y, concludes that the word "may" in the last clause of that article was intended to be used by the Legislature in a permissive sense, and invested the Commissioner of the General Land Office with power to sell isolated and detached sections or fractional sections of the public school land at his discretion for any price not less than $1.00 per acre.

We submit that this conclusion is clearly erroneous, and assign the following reason to support our contention:

(a) Had such been the intention of the Legislature, the amendemnt of said article, by the Act of 1897, would have

been made by striking out the word "two" and substituting therefor the word "one." This would have fully and intelligently accomplished this purpose; but such was not the amendment. The amendment struck out of the law of 1895 (article 4218y, Revised Statutes, 1895), the words "at not less than two dollars," and inserted in lieu thereof the words "at one dollar;" thereby clearly evincing a purpose to change the minimum price to a fixed and unchangeable price, and denying any and all discretionary power to the Commissioner. This view is further strengthened by the fact that the amendatory act also deprived the Commissioner of the power he had theretofore possessed to sell isolated lands "upon such terms as he might prescribe," and directed that the lands should be sold "upon the same terms as other public school lands are sold, under the provision of the law," thus showing beyond controversy the purpose of the Legislature to deprive the Commissioner of all discretionary power.

(b) In view of the constitutional requirement commanding the sale of all public school lands, and the law carrying the same into effect, by which all school lands, not isolated and which require classification, shall be sold to actual settlers only in quantities not exceeding four sections to each settler; it is plain that the language of article 4218y in the Act of 1897 means, and was intended to mean by the Legislature, that all the isolated and detached sections or fractions of sections of school lands **must be sold,** and that in doing so the sale "may" be made to any person whomsoever who will pay the sum of $1.00 per acre therefor, although such person is not an actual settler. The word "may" in nowise relates to the Commissioner, but applies exclusively to the purchaser. The language does not say that the Commissioner "may sell," but it says that the isolated sections shall be sold, and "may" be sold to any purchaser for the fixed price of $1.00 per acre. All

the school land shall be sold, those which are classified and not isolated, to actual settlers alone at not less than a minimum price fixed by the law ;and those which are isolated and hence require no classification, "may" be sold to any purchaser though he be other than an actual settler.

(c) If the construction adopted by the court be correct, then the Commissioner my sell the isolated sections for a price not less than $1.00 per acre to such person as he may select as an object of his favor or bunty. For the courts holds that the Commissioner may sell, or may not sell, to any applicant as he in his discretion may determine; thus giving him an opportunity to reward his friends and punish his enemies—a power at once repugnant to justice and destructive of equality before the law.

(d) The construction adopted by the court is contrary to the wellrecognized canon of statutory construction adopted in Smission vs. The State, 71 Texas, 222, holding that "may" is always used in the sense of "shall," where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification.

(e) That the Legislature used the word "may" in the sense of "shall" appears conclusively from the emergency clause in the repealing Act of 1899, repealing the Act of 1897, in which the Legislature gives as a justification and cause for the repeal, the every reason that the sale of this land which the Act of 1897 required to be made, at the fixed price of $1.00, was to the detriment of the public school fund. Nor is it an answer to this statement of the Legislature that in the opinion of the court the Act of 1897 was improvident legislation; for the Legislature itself, being a co-ordinate branch of the government, is the exclusive judge

of the wisdom or improvidence of its legislation. So far as the record shows in this case, the legislation of 1897 fixing the price of isolated sections of school lands at $1.00 per acre, may not have been, and as is well known was not, at that time at all improvident. But the subsequent appreciation of the price of land under the general stimilus of prosperity throughout the entire country undoubtedly made it wise to pass the repealing Act of 1899. For this reason the court can not adopt as a safe canor of stautory construction the value of the land in the year 1900.

(f) That "may" was used in the sense of "shall" is further apparent from the fact that it is frequently so used throughout the entire statute of which 4218y is a part. Thus it was apparent that in the sixteenth section of the act under consideration by the court in Smisson vs The State, providing that pasture lands and agricultural lands "may" be leased, the word "may" did not invest the Commissioner with the power to lease or not as his discretion might dictate, but that "may be leased" meant "shall be leased." And, again, in article 4218f, Revised Statutes, as amended in 1897, it is provided that in cases where lands have been forfeited that the purchasers may have their claims reinstated upon certain conditions.

Certainly every one will admit that the word "may" is there used in the sense of "shall," and that the Commissioner would be without discretion to deny reinstatement to any purchaser who complied with the law.

Again, in section 5 of the Act of 1895, the word "may" occurs twice in the proviso attached to said section, and is plainly used in the sense of "shall," as otherwise the sense of the section would be nullified.

That the word "may" is used in the sense of "shall" in the particular statute in question is further apparent when the history of the legislation of which it forms a part is considered,

as is aptly stated by the Supreme Court of Texas in its first opinion in this case. The court says:

"It is to be observed that the provision in question only applied to lands lying in counties which had been organized before January 1st, 1875. Isolated sections and parts of sections of such lands had long been upon the market when the act which embraced this provision was passed, and had remained unsold. The presumption was that they were of little value and not marketable under the general provisions of the act. They were like the unsold remnants of a stock of merchandise—not sold because not saleable upon the terms and conditions upon which the bulk of the stock had been sold. This consideration doubtless impelled the Legislature to enact the special provision for the sale of detached lands. Therefore, in the original act, they removed all restrictions save as to a minimum price, and provided that such lands should be sold at such price not below $2.00 per acre, and upon such terms as the Commissioner of the Land Office might prescribe. It was ten years after the passage of the first act which conferred this power upon the Commissioner that the amendment was passed which was in force when the relator made application to purchase the lands in controversy in this case. The consideration which led to the first action of the Legislature bore with great force at the time the amendment was adopted. The Legislature doubtless then felt that the previous law had been inadequate for the disposition of these remnants of public free school lands, and that to affect a sale it was necessary not only to lower but to fix the price, and to take away all discretion in the premises from the Commissioner. The history of the legislation and the circumstances surrounding its subject-matter impel to the conclusion that the purpose of the Twenty-nfth Legislature, in passing the amendment of 1897, was to

make it the duty of the Commissioner of the General Land Office to accept all bids for isolated sections and parts of sections of the school lands at $1.00 an acre, upon the purchasers tendering the part of the purchase money and the obligation for the balance, as was required by the general law."

These isolated and detached sections which are to be sold to any purchaser, although not an actual settler, it thus appears are confined to counties organized prior to 1875, and were therefore necessarily the remnants of lands left over after purchasers had picked over and over again the public school lands in these counties. Each person, as he came along to settle in these old counties, acquired land either by virtue of a certificate, under the homestead donation or pre-emption acts, or under acts selling public free school lands, and picked out the best that was left; and when finally a section became isolated and detached, because all other State lands surrounding it had been sold, it must, in the nature of things, have been the poorest and least valuable in that vicinity.

It is unquestionably true, therefore, that at the time of the enactment of the law in 1897 it was believed, and found to be true, that these sections could not be sold, because they were remnants. An isolated section of timbered land, far away from the convenience necessary to bring the timber to a sawmill, can be of little value. In area it is too small to justify the building of a mill upon it or near it, as it would not afford sufficient employment for so expensive an investment. It must also be true that all these isolated sections of timbered lands are not within the reach of mills, otherwise they would have been purchased by mill owners. These conditions are equally applicable to grazing lands. For the cattle industry could not be prosecuted upon a single section of land to any advantage, and, hence, an isolated grazing section, cut off

from an opportunity to be united with other grazing lands, does not offer a reasonable investment for a stock-raiser, and its price must for that reason be depressed. But by the general appreciation of lands all over the State, resulting from high prices of all agricultural, ranch and dairy products, and the increase in the price of lumber, even these remnants of lands known as isolated and detached sections increased in price, and the Legislature, when it met in 1899, promptly repealed the Act of 1897, by which these lands could be sold at $1.00 per acre.

The Supreme Court of Texas, however, in its second opinion in this case, holds that plaintiff in error is not entitled to have an award or the timbered section, even if the interpretation of the statute contended for by us be true, for the reason that in the purchase of isolated and detached lands which are timbered the entire purchase sum must be paid in cash. It seems to us that under the statute in question this decision is untenable. Article 4218y, as amended by the Act of 1897, unequivocally provides that **all** sections or a fraction of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public school lands, shall be sold to any purchaser at $1.00 per acre, upon the same terms that other lands are sold under the provisions of the law. The law is emphatic and unambigious in its declaration that all isolated and detached sections and fractions of sections shall be sold at the price of $1.00 per acre. Not that some of said lands, or a particular class thereof, such as agricultural and grazing lands, may be sold at the price of $1.00 per acre, but all lands, whether agricultural, grazing or timbered, must be sold upon the same terms. The statute could not be plainer

or more emphatic, and its language leaves no room for construction.

By the decision of the Supreme Court of Texas, however, the statute is made to read that only **grazing and agricultural** lands may be sold for $1.00 per acre. Thus, the court by its decision adds to the statute after the word "all" the words "grazing and timbered," which were not put into it by the Legislature. The argument of the court that timbered lands were not intended to be embraced in the provisions of article 4218y because of those sections of the Act of 1895, which provide that timbered lands shall not be sold for less than $5.00 per acre, and that the timber may be sold separate from the lands, appears to us as unsound, for if that be true, then it may be maintained with equal reason that agricultural and grazing lands are not embraced in the provisions of article 4218y, because under other provisions of the Act of 1895 they, too, have a minimum price, below which they are not to be sold. Therefore if the argument of the court be carried to its natural result, there would be no land of any kind that might be sold under the provisions of article 4218y, and that article would be meaningless and without purpose.

The Act of 1895, as had been done by the Act of 1887, provided a complete system for the sale of public school lands of the State. In doing so it divided the entire body of the land, which was to be sold to actual settlers, in three classes, viz: Agricultural, pasture and timbered land. It then fixes a minimum price upon each one of these classes. Agricultural lands are to be sold at not less than $2.00 per acre, pasture lands at not less than $1.00 per acre, and timbered lands at not less than $5.00 per acre. Article 4218h, Revised Statutes, of Texas, 1895, provides that the Commissioner of the General Land Office shall have the aforesaid lands classified and valued, after which he shall place them on the market for sale

at the valuation fixed thereon by him, which valuation must not be below the minimum price fixed by the law. It is evident that these provisions of the law apply exclusively to such lands as shall be sold to actual settlers only, and not to isolated and detached lands; because there can be no reason why the Commissioner should classify or value isolated and detached lands, inasmuch as they are to be sold under the Act of 1897 at $1.00 per acre. Classification or valuation could not increase or diminish their price. Classification of isolated and detached sections of land was never required under any of the acts of the Legislature by which these lands were offered for sale upon terms different from those upon which the general body of the school land was put upon the market. Classification of school lands, other than those which were isolated and detached, was necessary to determine to what class each section of land belonged, for the reason that the law fixed a minimum price for each separate class of these lands. The law provided that the Commissioner should classify school lands, other than isolated or detached sections, to determine whether they were agricultural, grazing or timbered lands, and the law fixed a minimum price for each one of these classes. Until so classified and appraised by the Commissioner, these lands were not placed upon the market or offered for sale, and classification and valuation was a pre-requisite to the sale, which sale could only be made to an actual settler. Not so, however, with isolated and detached lands. As to them no classifications were required, for they were to be sold to any purchaser, though not an actual settler, at not less than $2.00 per acre, under former acts, and at the fixed price of $1.00 per acre under the Act of 1897, irrespective of the class to which they belonged—that is to say, whether they were agricultural, grazing or timbered, the price fixed by the law was the same for all. Hence there was no necessity for classification, as in

the case of other lands not detached and isolated, upon which the law fixed a minimum price varying according to the class to which they belonged. That is to say, lands classed as agricultural were offered by the law at not less than $2.00 per acre, grazing lands at not less than $1.00 per acre, and timbeerd lands at not less than $5.00 per acre. (Rev. Stats., art. 4218h.) But detached and isolated sections the law directed to be sold, irrespective of their class, whether timbered, grazing or agricultural, prior to 1897, at not less than $2.00 per acre, and by the Act of 1897, under which plaintiff made his application, at the fixed price of $1.00 per acre. (See Act of 1895, sec. 26, General Laws of 1895, p. 74; General Laws of 1897, p. 187; Revised Civil Statutes of Texas, arts. 4218e, 4218f, 4218h, 4218y.)

Classification and valuation are required only where lands are to be sold for a price fixed by such classification, and where the valuation is determined by the particular classification which is placed upon the lands—that is to say, public school lands which are not detached or isolated are first required to be classified. By this process it is determined whether they are agricultural, grazing or timbered lands. That having been done, the next step to make these lands ready for the market is to appraise their value, and according to such appraisement they are offered for sale. It is obvious that these requirements of the statute do not apply to detached and isolated sections or fractions or sections, because the law fixes their price and there can be no purpose for any inquiry into their classification or value. This being true, it must follow that detached and isolated sections or fractions of sections are sold by the State in contemplation of law without knowing whether they are timbered, grazing or agricultural, and hence they are sold simply **as land** for the sum of $1.00 per acre. The law itself, from the moment it went into effect,

placed these lands upon the market at $1.00 per acre, and whenever a purchaser applies therefor to the Commissioner of the Geenral Land Office and complies with the terms of purchase, the sale is completed and the Commission is without discretion or power to withhold the land from the purchaser.

Again, in every case in which the particular section of the law regulating the sale of isolated and detached sections of school land has come under review before the courts of the State of Texas, the doctrine has been broadly and unequivocally laid down that it applies to all sections of school lands, whether they are agricultural, grazing or timbered lands, so long as they are isolated and detached, and situated in counties organized prior to January, 1875. In the Act of 1887, this section was numbered 22; in the Act of 1895, it was numbered 26, and in the Revised Statutes it is numbered article 4218y.

The first case in which this particular section was under discussion in Eastin vs. Ferguson (4 C. C. A., 643). The opinion was delivered by Associate Justice Williams. The particular section at issue in that case was classed at "dry grazing," and valued at $2.00 per acre. It is distinctly held by the learned Justice that the party claiming to have purchased this grazing section as isolated and detached, was entitled thereto as against a subsequent purchaser claiming as an actual settler, provided the land was, in fact, isolated and detached. In the particular case, the evidence showed that the land was not isolated and detached, and for no other reason the subsequent purchaser was held to have the best title thereo. In the course of the opinion the following language is employed in construing the statute:

"The purpose is plainly manifest to define by the provision of the law itself what character of lands may be sold and what classes of persons may purchase. These questions are not left

to the discretion of the Commissioner, but are settled by the statute. He may sell, as directed by the law, to actual settlers all the lands specified ;and may sell to no other class of persons any of them except those which are isolated and detached."

So it appears from this case that grazing lands, as well as agricultural land, when isolated and detached, are subject to purchase by any person for the price fixed by law. The next case in which the same section was under review is **Cameron vs. State (7 C. A., 37). In this case, that of Eastin** vs Ferguson was approved, and upon application to the Supreme Court of Texas a writ of error was refused. The lands in controversy were portions of the public school lands in Liberty County. It was contended by appellant that all public free school lands situated in counties organized prior to January, 1875, were isolated and detached from other public school lands, and subject to sale to others than actual settlers. To this contention the court declined to assent, and said:

"The power given to the Commissioner to sell to others than actual settlers is not only restricted to lands situated in counties organized prior to January, 1875, but to those sections or fractions of sections of land situated in such counties, which are detached from other public school lands * * * The Legislature may in its discretion lease or sell the school lands, and it may restrict the sale of certain classes. It is for the Legislature to determine when these lands shall be sold and on what terms and at what price they may be sold, and whether they may be purchased by capitalists for speculation, or only by actual occupants of the premises."

Thus again in this case did the court assert the doctrine that all lands which are isolated and detached, though they be in character other than agricultural, are subject to sale to any purchaser under the aforesaid section of the law. And the Supreme Court of Texas refused upon application to grant

a writ of error to set aside or modify the construction of the statute as declared in said cause. The Court of Civial Appeals at San Antonio, construing this particular section of the statute in the case of Shaver vs. Tinsley (16 C. C. A., 369), in which the controversy involved three hundred and twenty acres of public free school land in Harris County, **classified as grazing land,** distinctly affirmed the principle announced in Cameron vs. State. (7 C. C. A, 37.) In this case that of Eastin there was between a person not an actual settler, who had purchased the land from the State as isolated and detached, and a party who had also, but subsequently, purchased the land as an actual settler from the State. The Chief Justice, delivering the opinion, holds that though the section was grazing land, that nevertheless the sale thereof by the State through the Commissioner of the General Land Office as an isolated and detached section created the presumption that it was in fact isolated and detached, and that unless said presumption was overcome by sufficient evidence, the first purchaser had the better title to the land. And the court, finding the evidence was not sufficient to overcome this presumption, awarded the land to the person who had purchased it as an isolated and detached section . The doctrine of this last case is fully confirmed in the case of Thomas vs. Wolfe (16 C. C. A., 22), decided by the Court of Civil Appeals at Galveston, Associate Justice Williams delivering the opinion, where it is again held that any section of school land situated in a county organized prior to January, 1875, was subject to sale to any purchaser, though not an actual settler, and that the burden of showing that lands so sold are not isolated and detached, rests upon the person asserting it.

It thus appears that in contemplation of law there is no timber or grazing section beforee the court in this case. All distinctions of that character are obliterated and merged in

that class which the law designates as isolated and detached sections. As was held by the court in its first opinion, isolated sections of land are not required to be classified, and without classification there can be no legal ascertainment of the character of the land, whether it is agricultural, grazing or timbered. Isolated and detached sections of school lands under the Act of 1897 are sold simply as land without any legal or official knowledge on the part of the Commissioner as to whether they are grazing, timbered or agricultural, there being no method fixed by the law by which these facts can be ascertained. The general Statute divides the great body of school lands into three distinct classes, viz: agricultural, grazing and timbered lands? These classes are to be ascertained by classification and their price is to be fixed by appraiseemnt. The law then by section 4218y substracts and takes away from this great body of school lands the isolated and detached sections and fractions of sections and makes them a fourth and separate class, and provides for their sale at one dollar per acre, without providing for any distinction between them as it does among the other classes of school lands. There is no provision that the isolated and detached sections shall be classified to ascertain their character, because such classification would be useless, the law having fixed their price at one dollar per acre. There being no classification there is no method by which the character of isolated and detached sections can be determined, and they must be sold as provided by the law as lands for which the terms are tohse which the relator offered in his application and obligation to the State.

If our reasoning on this subject be correct it must result in the conclusion that all isolated and detached lands must be sold at one dollar per acre, 1-40 of which is payable in cash and the balance in 39 equal installments with interest at the rate of three per cent per annum.

The record in this case does not disclose with certainty at what time the lands applied for by plaintiff in error became isolated or detached. This fact, however, is not material in the determination of the question involved here, for it is the accepted rule in the State of Texas that the law in relation to the sale of detached and isolated sections of school lands is applicable to such sections although they may have become isolated and detached even after the enactment of the law on that subject.

Plaintiff in error respectfully prays that the judgment of the Supreme Court of Texas may be reversed with instructions to that Court to issue the writ of mandamus directing the Commissioner of the General Land Office of the State of Texas to award him the land described in his petition.

F. C. Hume

Attorney for Plaintiff in Error, Paul O. Weber.

H. E. Kleberg

of Counsel.

Chapter 47.—An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools and the several asylums, and the lease of such lands and of the public lands of the State, and the patenting of any part of said lands for church, cemetery or school house sites; and to prevent the free use, occupancy, unlawful enclosure or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor.

Section 1. Be it enacted by the Legislature of the State of Texas: That all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the Lunatic Asylum, the Blind Asylum, the Deaf and Dumb Asylum, and the Orphan Asylum shall be sold and leased under the provisions of this act.

Sec. 2. The Commissioner of the General Land Office is hereby vested with all the power and authority necessary to carry into effect the provisions of this act, and shall have full charge and discretion of all matters pertaining to the sale and lease of said lands, and their protection from free use and occupancy and from unlawful enclosure, with such exceptions and under such restrictions as may be imposed by the provisions of this act, or by the Constitution of the State. He shall, as soon as practicable, adopt such regulations not inconsistent with the Constitution or this act as may be deemed necessary for carrying into effect the provisions of this act, and may from time to time alter or amend such regulations so as to protect the public interest; but all regulations shall be submitted to the Governor for his approval before adoption or promulgation. He shall adopt all necessary forms of applications for sales or leases and all other forms necessary or

proper for the transaction of the business imposed upon him by this act, and may from time to time call upon the Attorney General to prepare such forms; and it shall be the duty of that officer to furnish the Commissioner of the General Land Office with such advice and legal assistance as may be requisite for the due execution of the provisions of this act; and it shall be the duty of such Commissioner to call upon the Attorney General for advice whenever there is any doubt as to the meaning of this act or any provisions thereof.

Sec. 3. The Commissioner of the General Land Office shall from time to time, as the public interest may require, cause any or all of the lands belonging to the several funds mentioned in this act to be carefully and skillfully classified and valued that have not heretofore been classified, and for this purpose he may appoint, with the approval of the Governor, such number of competent agents, who shall be citizens of the county or district where such land is situated, as may be necessary, or may determine and declare the classification and valuation without the aid of such agents, and upon such facts as may be satisfactory to the Commissioner. Such agents shall receive for their work a reasonable compensation, to be fixed by the Commissioner of the General Land Office, and not to exceed the sum of three dollars per section; and no such expense shall be incurred in the absence of an appropriation by law to cover such expenditure, and the State shall not be liable for any expenditure of this character incurred in excess of current appropriations.

Sec. 4. It shall be the duty of such agents as may be appointed under the provisions of this act, under such restrictions and instructions as may be prescribed by the Commissioner of the General Land Office, to classify such lands belonging to the several funds mentioned in this act as the Commissioner may direct, into agricultural, pasture, and timber

lands, and for this purpose they shall carefully examine the same and after such examination they shall prepare an accurate plat of each section, showing the relative proportions of timber and open land on such section, and their situation; also, the quality of the soil, the topography of the land, and the quality and kind of timber, and the streams and other sources of water supply, and their location, and such other facts as may be important; and from time to time, as may be prescribed by the Commissioner of the General Land Office, such agent shall prepare and forward to the Commissioner, with such plats, a tabulated statement of such lands so examined by him, with the value of each section, and such plats and reports when approved by the Commissioner shall be filed in the General Land Office as a part of the records of said office; but nothing in this act shall be construed to require or authorize a classfication of lands already classified under former laws. Provided, that any section or part of any section heretofore classified as timbered land which is not pine land nor valuable chiefly for the timber thereon may be classified under the provisions of this act as agricultural lands.

Sec. 5. When any portion of said land has been classified to the satisfaction of the Commissioner under the provisions of this act or former laws, such lands shall be subject to sale, but to actual settlers only, and in quantities of not less than forty acres, and in multiples thereof, nor more than one section containing six hundred and forty acres more or less: Provided, that when there is a fraction less than forty acres of any section left such fraction may be sold; but lands classified as purely pasture lands may be sold in quantities not to exceed four sections to the same settler.

Sec. 6. It shall be the duty of the Commissioner of the General Land Office to notify in writing the county clerk of each county of the valuation fixed upon each section of land in

his county, and in each county attached to it for judicial purposes, which he offers for sale, which notification shall be kept by the clerk in his office and recorded in a well bound book, which shall be open to public inspection.

Sec. 7. All lands belonging to the public free schools and the several asylum funds shall be sold at no less than two dollars per acre, except pasture lands, which shall be sold at not less than one dollar per acre, and all timber lands shall be sold at not less than five dollars per acre. By timber lands as here used is meant lands valuable chiefly for the timber thereon.

Sec. 8. Any bona fide actual settler who may reside on any part of the lands the sale of which is authorized by this act at the time this act may go into effect, shall have the prior right for a period of ninety days after this act goes into effect, or after said land shall have been placed upon the market, to purchase such quantity of land as may be limited by this act, to include his improvements, upon complying with the provisions of this act regulating sales as in other cases, and such land shall be appraised without reference to the improvements thereon. Any bona fide settler who has heretofore purchased or who may hereafter purchase not exceeding one section of agricultural land, shall have the right to purchase three strictly pastoral sections upon his making oath that he is not acting in collusion with others for the purpose of buying for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same.

Sec. 9. All sales shall be made by the Commissioner of the General Land Office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their

purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former laws, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein. Any person desiring to purchase land in accordance with the provisions of this act shall forward his application to the Commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. Any owner of land heretofore purchased, and which land has been or may be forfeited for nonpayment of interest, shall have ninety days prior right after this act goes into effect, or after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he

shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years: Provided, that when any forfeiture has been made the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. Any original purchaser or his vendee of any of the lands the sale of which is provided for in this act, who has improved such land as a home, and who has been forced to temporarily abandon same on account of drouth, and who shall in good faith reoccupy the same, either by themselves or vendees, within six months after this act goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy: Provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have reoccupied the land as a home in good faith, and that they had abandoned the same on account of the drouth and not otherwise; and such absence shall not be deducted from the three years occupancy required by law in making final proof of occupancy: And provided further, that any purchasers or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases shall have six months after this act shall take effect to make such proof of occupancy as required by the provisions of this act. The purchaser shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth

of the aggregate price, with interest at the rate of three per cent per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office: Provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase.

Sec. 10. Purchasers shall have the option of paying the purchase money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land for three consecutive years, they shall receive patents for the same upon payment of the patent fees prescribed by law. Purchasers may also sell their lands or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this act, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years residence has not already been had upon said land and proof made of the fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and

that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject to all the obligations and penalties prescribed by this act, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon: Provided, that whenever a town shall be located and established upon any lands sold under this or any former act, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the State upon such land and obtain a patent therefor at any time, but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the General Land Office a certified plat of such town, made by a surveyor, which shall be accompanied by the affidavit of the owner of such land, corroborated by the affidavit of five disinterested and credible citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and is being occupied by bona fide citizens, twenty business and residence houses, or either, or both.

Sec. 11. If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation "Land Forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law: Provided, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make

payment after the first day November next after such death, and shall be absolved and exempt from the requirement of settlement and residence thereon. And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred: Provided, that all necessary and temporary absence from such land of such purchaser, for the time of not more than six months in any one year, for the purpose of earning money with which to pay for the land, or for the purpose of schooling his children, shall not work a forfeiture of his title: Provided further, that nothing in this section contained shall be construed to inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land, which suit may be instituted by the Attorney General or under his direction, in the proper court of the county in which the land lies or of the county to which such county is attached for judicial purposes: Provided, this section shall be printed on the back of the receipt.

Sec. 12. In all cases where persons have purchased or may hereafter purchase State, school, or asylum lands under any act of the Legislature authorizing the sale thereof and requiring a residence of three years thereon, and said persons have so resided upon said land or may hereafter reside thereon for the period of three years as required by law, and their files have been or may hereafter be canceled and purchases annulled by the Commissioner of the General Land Office on account of conflict with other surveys, said persons shall have the right to purchase other lands of the classes mentioned in

this act without being required to reside thereon. Persons desiring to avail themselves of the benefits of this provision shall make satisfactory proof to the Commissioner of the three years residence under their first purchase.

Sec. 13. In all cases where any of the lands mentioned in this act have been heretofore sold under any law authorizing the sale thereof, and the original purchaser shall have sold or may hereafter sell any part of his purchase in quantities of forty acres or multiples thereof, and the conveyance to his vendee or vendees is filed in the General Land Office after having been duly recorded in the proper county, the Commissioner and Treasurer shall credit his account with the value of the land sold, and they shall open up new accounts with the original purchaser and such vendee or vendees, and the Commissioner of the General Land Office shall patent said land to the owners thereof in quantities of forty acres or multiples thereof: Provided, that when any of such land it situated within three miles of a county seat, it may be patented in twenty acre tracts.

Sec. 14. The Commissioner of the General Land Office is hereby authorized to patent in quantities of not less than one nor more than five acres any of the vacant and unappropriated public domain of Texas or any of the lands mentioned in this act as sites for cemeteries, churches or school houses. When the land is desired as a location for a school house, the patent shall issue to the county judge of the proper county and his successors in office in trust for that purpose; and when desired for a church house or a cemetery, it shall be issued to trustees designated by those requesting the patent. If the land has been previously sold by the State and not patented, the owner thereof shall execute a deed therefor to the county judge or trustees as the case may be, and cause the same to be recorded in the office of the county clerk of the proper county, and be

filed in the General Land Office, and shall be entitled to credit on his account with the State for the value therefor. Except in case of vacant land the value of the land shall be deposited with the State Treasurer, and in all cases the patent fees shall be paid to the Commissioner of the General Land Office before patent issues. Such land shall be taken from the margin of a tract or section or of a subdivision thereof, as the case may be.

Sec. 15. The Commissioner of the General Land Office shall retain in his custody as records of his office all applications, affidavits, obligations and all other papers relating to the sales of said lands, and shall cause to be kept accurate accounts with each purchaser. All purchase money due upon lands, as well as accrued interest, and all other moneys arising from the sales or leases of said lands shall be paid by the purchaser or lessee direct to the Treasurer of the State, who shall cause an accurate account to be kept with each purchaser, and who shall execute duplicate receipts for all sums of money paid to him under the provisions of this act, one of which receipts shall be delivered to purchaser or his agent, and the other transmitted to the Commissioner of the General Land Office.

Sec. 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value: Provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to re-

move the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment: Provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to the classifications to be made by the Land Commissioner: Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act.

Sec. 17. The public lands and all lands referred to in the several funds mentioned in this act shall be leased by the Commissioners of the General Land Office under the provisions of this act. All lands classified as agricultural and all lands containing permanent water thereon shall be leased for a term of five years or less at not less than three cents per acre per annum, and all lands classified as pasture or dry grazing lands shall be leased for a term of not more than ten years at not less than two cents per acre per annum, which rental shall be paid yearly in advance, the first payment to be made at the time the lease contract is entered into. If at the termination of any lease the lands covered thereby are still for lease the lessee thereof shall have the preference right to again lease such lands theretofore leased by him upon the terms and at the prices then fixed by law. All leases shall be executed under the hand and seal of the Land Commissioner and delivered to the lessee or his duly authorized agent, and such lease shall not take effect until the first annual rental is paid, and such lease thereof duly filed for record in the clerk's office of the proper county, and it shall not be necessary for the Commissioner to acknowledge such lease contract so signed and delivered; and all leases under the provisions of this act shall be

advertised by the Commissioner in such manner as he may think best, and let to the highest responsible bidder in such quantities and under such regulations as he may think to the best interest of the State, not inconsistent with the equities of the occupant. All bids and offers to lease may be rejected by him prior to signing the lease contract, for fraud or collusion, or other good and sufficient cause.

Sec. 18. Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this act shall make application in writing to the Commissioner of the General Land Office, specifying and describing the particular lands he desires to lease, and thereupon the Commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, shall notify the applicant in writing that his proposition to lease is accepted, and thereupon he shall execute and deliver to the lessee, in the name and by the authority of the State of Texas, a lease of said land for such term as may be agreed upon, and deliver the same to such lessee when satisfied that the lessee has paid to the Treasurer of the State the rent for one year in advance. No lands which are now or may hereafter be classified as grazing or pasture lands shall be subject to sale, nor shall the possession thereof by the lessee be disturbed during the term of such lease, except as herein provided, so long as the rents are paid promptly in advance each year, as required by this act. Any actual settler upon any of the lands mentioned in this act, being the head of a family, shall have the right to buy at any time not more than three additional sections of strictly pasture lands, notwithstanding any lease thereof, unless by some other actual settler, the head of a family, leasing not more than three sections. Whenever any leaseholder has leased from the State of Texas exceeding ten sections, any actual settler being the head of a family, shall have the right to lease within

a radius of five miles of the land occupied by him not exceeding three sections of the land held by such larger leaseholder, but shall not be allowed thereby to reduce the larger leasehold to less than ten sections: Provided, that any man not the head of a family shall have this preference right to lease three sections after having placed two hundred dollars worth of improvements on the section purchased by him: Provided, that in all cases where the actual settler having purchased one section of land is permitted by the provisions of this section to buy or lease additional lands, and thus terminate the lease of the larger leaseholder, he shall be required to so select such additional lands sought to be purchased or leased by him as that by an exchange of lands, section for section and acre for acre, of like quality and class with the larger leaseholder, he can secure the quantity of land he desires to purchase or lease in a solid body; and in case the larger leaseholder desires to do so, the actual settler so purchasing or leasing the additional lands in this section mentioned shall make such exchange with him, and shall be required to fence the same separate and apart from the lands of the larger leaseholder; but in no case shall the actual settler be allowed to purchase or lease the lands and terminate the lease of the larger leaseholder under the provisions of this section upon which there is a permanent natural or artificial water supply; and in no case shall such actual settler be permitted to so select such additional lands for purchase or lease as that by an exchange of lands with the larger leaseholder such larger leaseholder will be required to give in exchange any lands upon which there may be a permanent natural or artificial water supply, or upon which there may be improvements of the value of two hundred dollars. In case the larger leaseholder does not desire to exchange lands, as herein provided, with the actual settler, or upon request made by such actual settler refuses to do so within a reason-

able time, then he shall not be required to fence his land, but may turn loose inside of any inclosure in which his lands may be situated not more than one head of cattle or horses, or in lieu thereof four head of sheep or goats, for every ten acres of land so purchased or leased by him: Provided further, that nothing herein shall be construed so as to prevent either the lessee from fencing his own land from the other if he should desire to do so, or to require the small leaseholder to fence his lands at all unless the larger leaseholder shall have his leasehold fenced: And provided further, that nothing in this section shall be so construed as to permit any actual settler, either by purchase or lease, or by both, to terminate the lease of the larger leaseholder upon more than four sections: And provided further, that north of a line extending west from the southeast cornerof Callahan county to the southeast corner of Martin county; thence north to the south line of Lynn county; thence west to the southwest corner of Lynn county; thence north to the south line of Castro county; thence west to the line of New Mexico, the settler exercising the preference right herein given to buy or lease within the enclosure of another may so buy or lease any lands except a section on which there are improvements of the value of two hundred dollars, or on which there is a permanent artificial water supply, and shall not be required to enclose his lands separate from the lands of the larger leaseholder unless he can obtain the full amount of four sections in a solid body, or unless the same can be secured in a solid body by the exchange of lands for the term for which he leases, section for section or acre for acre, with the larger leaseholder; and in all cases where he is not required by the provisions of this act to enclose his lands he may turn loose not more than one head of horses or cattle, or in lieu thereof four head of sheep or goats, for every ten acres of land purchased or leased by him and unenclosed. Each violation of

the provisions of this act which restricts the number of stock that may be turned loose on lands leased from the State shall be an offense, and the offender, on conviction, shall be punished by fine of one dollar for each head of stock he may so turn loose, and each thirty days violation of the provisions of this section shall constitute a separate offense. Any agricultural land that may be leased by an actual settler shall be subject to sale and settlement, but in case his lease does not embrace more than three sections, only on condition that the purchaser enclose with posts and at least two wires the land purchased by him separate from the land held by the lessee, and failure to so enclose it within three months from the date of the purchase shall be sufficient cause to authorize the Commissioner to cancel the contract of purchase and reinstate the lease. In all cases where the lease is terminated under any of the previsions hereof, before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent, or the money refunded to him by the Treasurer, as he may elect. On the expiration of his lease or its termination under any provision of this section the lessee shall have the right for a period of sixty days to remove any or all the improvements he shall have placed upon the leased premises.

Sec. 19. Any person desiring to lease any portion of the lands aforesaid on which no permanent water supply exists, shall notify the Commissioner of the General Land Office in writing that he desires to lease lands, specifying and describing them, provided he can obtain the necessary supply of water by boring or otherwise, and that he will within ninety days lease said lands, provided such water supply can be obtained; he shall also make and file with the Commissioner of the General Land Office his bond, with good and sufficient personal security in a sum equal to one year's rental of the quantity of land applied for, payable to the State of Texas,

conditioned that he will diligently and in good faith try to secure water on such land during such ninety days, and if secured will lease the designated lands for the term prescribed herein, and thereupon the Commissioner shall for such ninety days withhold the lands thus designated from lease to any other person; within or at the expiration of said ninety days and annually thereafter such applicant to lease shall pay to the State of Texas, in advance, one year's retal of the land applied for by him, on satisfactory proof of which payment the Commissioner shall execute and deliver to the lessee a lease of the said lands, signed by him officially and attested by the seal of the Land Office, together with which he shall deliver up the bond of said lessee, marked "Satisfied." If the said lessess shall fail to apply for his lease and make the payment aforesaid within said ninety days, and shall also within said ninety days fail to make proof to the satisfaction of the Commissioner of the General Land Office within that time that he has in good faith and diligently used proper means and expended proper efforts to secure a water supply on such land and failed, then and in that case the Commissioner shall mark said bond "Forfeited," and shall deliver the same to the Attorney General of the State, who shall at once cause the said bond to be sued upon and collected; and such collection shall become a part of the available school fund. The penalty stated in such bond is hereby declared to be liquidated damages, and judgment for that sum shall in all cases be recovered by the State. Proof satisfactory to the Commissioner of the General Land Office that proper, suitable and diligent effort had been made by such applicant to secure water, and that sufficient water could not be secured, shall relieve the principal and sureties on said bond from all responsibility therein, and it shall be marked "Satisfied" by said Commissioner and delivered to the principal therein. No lease of less than four sec-

tions of unwatered pasture lands shall be made unless such less number includes all unlased land in that vicinity belonging to the several funds mentioned in this act. Lessees or their vendees who shall have at their own expense secured water on their leaseholds in accordance with the provisions of this section shall, at the expiration of their lease contract, have the right to a renewal of their leases for another term of five years at the price then provided by law, by giving sixty days written notice to the Commissioner, as provided in the preceding section.

Sec. 20. All lessess from the State of lands named in this act, who are one year or more in arrears on their contract for rent, shall have the right for a period of four months from the time this act shall go into effect, but not longer, within which they may execute and deliver to the Commissioner of the General Land Office their respective obligations in writing, with personal security satisfactory to the Commissioner, for the respective sums of money then owing by them to the State; and on delivery of such obligation to the Commissioner and the cash payment of one year's rental in advance, they shall have the right to have their lease contracts canceled, and may lease such lands anew under this act. Such obligation shall bind such lessees to pay said sums of money, one-third in one year, one-third in two years, and the remainder in three years from date, and shall draw six per cent interest per annum, payable annually; and thereupon the Commissioner shall balance their accounts on the books of his office and cancel and deliver up their old leases and make to them new leases under this act. All lessees who are not in arrears for rent, or who shall pay all indebtedness on leases, have the right to surrender their present leases and lease anew their said lands under this act.

Sec. 21. All lessees shall pay the annual rents due for leased lands directly to the Treasurer of the State, who shall execute receipts in duplicate for each payment made by any lessee, one of which receipts shall be delivered to the lessee and other transmitted to the Commissioner of the General Land Office. The Treasurer shall cause to be kept an accurate account with each lessee, and the Commissioner of the General Land Office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute a part of the records of his office.

Sec. 22. If any lessee shall fail to pay the annual rent due in advance for any year within sixty days after such rents shall become due, the Commissioner of the General Land Office may declare such lease canceled by a writing under his hand and seal of office, which writing shall be filed with the other papers relating to such lease, and thereupon such lease shall immediately terminate, and the lands so leased shall become subject to purchase or lease under the provisions of this act. Such lease shall not be made to original lessees until all arrears are fully paid. During the continuance of all leases, and after forfeiture, the State shall have a lien upon all property owned by the lessee upon the leased premises to secure the payment of all rents due, which lien shall be superior to all other liens whatsoever; and it shall not be essential to the preservation or validity of such lien that it shall be reserved in the instrument of lease.

Sec. 23. Lessees have the right at any time to purchase their leased lands, subject to the limitations as to quantity provided by this act, and at the price and on the conditions herein provided, without reference to any improvements made on such lands by such lessees; and all improvements made by lessees on lands leased by them are hereby declared to be per-

sonal property, which may be removed by such lessees on the expiration of their lease contracts; and they shall have sixty days after such expiration in which to remove the same.

Sec. 24. If the Governor shall at any time be informed upon the affidavit of some credible person that any portion of the public lands or the lands belonging to any of the several funds named in this act have been enclosed, or that fences have been erected thereon without authority of law, he is authorized in his discretion to direct the Attorney General to institute suit in the name of the State for the recovery of such lands and damages, and a fee of not less than ten dollars for the attorney when the sum recovered is less than one hundred dollars, and when it is over that sum the fee shall be ten per cent, to be paid by the defendant for the use and occupancy of the same, and the removal of such enclosures and fences and such damages shall not be for a less sum than the amount of all the leases due during such occupancy. Such suit may be instituted in the district court of the judicial district in which the land or any portion thereof (is) situated; and upon application of the Attorney General and without affidavit or bond the court in which suit is pending shall issue a writ of sequestration directed to any sheriff of the State, commanding and requiring such officer to take such land and all property thereon belonging to the person or persons so unlawfully occupying said land into his actual custody, and hold the same subject to the further orders of the court. Such writ of sequestration may be executed by any sheriff of the State into whose hands it may be delivered, and it shall be the duty of any sheriff into whose hands it may come to proceed and execute such writ. The defendant in such suit may replevy as in ordinary cases by giving bond as prescribed by law, and such cases shall have precedence on the docket and stand for trial before all other cases; and in case judgment is recovered by

the State in such suit, the court shall order such enclosures or fences to be removed and shall tax the costs of the suit, if any, against the defendant; and all property found upon the land belonging the defendant, not exempt from execution, shall be liable to the payment of such costs and damages in addition to the personal liability of the defendant. Appeals may be prosecuted from all judgments in such cases as in ordinary cases, except that the State shall not be required to give bond to perfect its appeal, and such cases on appeal shall have precedence over all other cases. If any person shall make a lease contract, and after the same is enclosed by fence shall for any cause decide not to continue payment of his lease, either in whole or in part, he shall give public notice by publication in any local paper having the largest circulation, for at least sixty days before the time in which his next annual payment shall become due, that he will not continue his lease after the year for which payment is made, and shall also state the number and block of the land which he will not lease inside his enclosure, if he only intends to surrender a part of his lease, and shall post and keep posted for said sixty days notices on all the gates of his pasture of such intention; then, and then only, he shall not be subject to the suit nor be liable for the damages provided for in this section.

Sec. 25. It shall be unlawful for any person to fence, use, occupy or appropriate by herding or line riding, any portion of the public lands of the State or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, agent, employee or servant, who shall fence, use, occupy or appropriate by herding or line riding any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon convic-

tion, be fined not less than one hundred nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, occupying using or appropriating by herding or line riding shall be deemed a separate effense, and any person so offending may be prosecuted by indictment or information in the proper court of the county where any portion of the land lies, or to which it may be attach for judicial purposes, or in the county of Travis, and jurisdiction of such offenses is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this article, it shall be the duty of the Governor to demand the extradition of the defendant from the proper officer of any State or Territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this article, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs, whether the same shall enclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act or of the public lands of this State, without having first obtained a lease thereof, by fencing of any kind, or by enclosures consisting partly of fencing and partly of natural obstacles or impediments to the passage of live stock, shall be deemed an unlawful appropriation punishable as provided in this article for appropriating such lands, and each day said land is appropriated shall be deemed a separate offense.

Sec. 26. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for purposes of settlement; and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in

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immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe.

Sec. 27. All laws and parts of laws in conflict with this act are hereby repealed.

Filed Sept. 30, 1908.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 167.

PAUL G. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR AND AFFIRM, WITH BRIEF AND ARGUMENT.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 107.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM, WITH BRIEF AND ARGUMENT.

Comes now Charles Rogan, Commissioner of the General Land Office of the State of Texas, defendant in error, by his counsel appearing here for him in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree from which said writ of error purports to have been sued out is a judgment or decree of the Supreme Court of one of the United States, towit: the Supreme Court of Texas, and there is no question involved herein that would authorize the exercise of the appellate jurisdiction of this court.

And the said defendant in error, by counsel aforesaid, also moves the court to affirm said judgment or decree from which said writ of error purports to have been sued out, because, although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

C. K. BELL,
Attorney General of the State of Texas,
Counsel for Chas. Rogan, Commissioner General Land Office, Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1902.

No. 107.

To Mr. M. E. Kleberg, Counsel for Paul O. Weber, Plaintiff in Error:

Please take notice that on Monday, the 13th day of October, 1902, at the opening of the court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States, for the decision of said court thereon. Affixed hereto is a copy of the brief and argument to be submitted with the said motion in support thereof.

C. K. BELL,
Attorney General of the State of Texas,
Counsel for Chas. Rogan, Commissioner General Land Office, Defendant in Error.

STATEMENT FROM THE PRINTED RECORD.

Plaintiff in error, Paul O. Weber, instituted this proceeding in the Supreme Court of the State of Texas against Charles Rogan, Commissioner of the General Land Office of said State, defendant in error, to compel him, by writ of mandamus, to accept applications made to him by plaintiff in error to purchase certain of the public school lands of the State, and to award to him the said lands, said applications and awards having been rejected and refused by the Land Commissioner. The applications of the plaintiff in error are alleged in his original petition, from which it appears that the lands sought to be purchased were isolated and detached and situated in counties organized since January 1, 1875, other than Pecos, Presidio and El Paso, and consisted of one section, which, at the time of the application to purchase, was classified as timbered land, and one-half section which was at the time of the application classified as grazing land. It further appears from the petition that the Land Commissioner refused to accept the application and to award plaintiff in error the land for the reasons, as alleged in the petition:

"That the said two sections so applied for to be purchased by your petitioner have heretofore been classified by the Commissioner of the General Land Office,—the first as timbered land, and the second as grazing land, and that the law is not applicable to sections of grazing and timbered land, but that all sections of land and fractions of sections in this State that are either classed as grazing or timber sections can not be purchased under the law in force at the date of your petitioner's application for one

dollar per acre, although such grazing and timber sections, or fractions of sections are isolated and detached from other public lands and are situated in counties organized prior to the first day of January, 1875 (other than El Paso, Presidio and Pecos counties), and that there was at the date of the filing of your petitioner's application no law in the State of Texas by and under which the Commissioner of the General Land Office could lawfully have awarded the two aforesaid sections of land to your petitioner at the price of one dollar per acre offered therefor by your petitioner." (Printed Record, pp. 1-3.)

It appears from certified copies of the applications attached to the petition that the reason given by the Commissioner for his refusal, as to the timbered section, was as follows:

"This application is rejected because applicant applies for same at $1.00 per acre, one-fortieth cash and executing his obligation for thirty-nine-fortieths of same.

"This land, under Act of 1887, was classified as pine timber and valued at $8.00 per acre, and that being the classification and valuation on the date of the filing of this application a sale at $1.00 is declined." (Record, p. 8.)

And as to the grazing one-half section, was as follows:

"This land was sold to McHenry Winburn May 11, 1897, on the classification and valuation made under the Act of 1887, which was watered grazing land, valued at $2.50 per acre. Said sale was forfeited for non-payment of interest July 20, 1899, and this department, on September 1, 1899, placed this land

on market as grazing land, valued at $2.00. This application must be rejected for two reasons:

"1st. At the date of filing this application, August 11, 1899, this land was not on market, and an application to purchase must date after land is placed on the market.

"2nd. This land is classified as grazing land and valued at $2.00 per acre, hence the application at one dollar is declined." (Record, p. 11.)

Respondent (defendant in error) in said cause answered by special exceptions, in substance, (1) that the statute under which the relator (plaintiff in error) sought to purchase said lands related to agricultural lands only, and (2) that said statute did not confer upon relator the absolute right to buy the land, but provided that the land "may be sold," etc., thus giving the Commissioner a discretion as to whether he would sell the same as detached lands, etc. Respondent, answering to the facts, alleged that one section was classified as timbered land and valued at $8.00 per acre, which was its fair and reasonable value at the time of the application, and that the half section was at that time classified as grazing land and valued at $2.00 per acre, which was its fair and reasonable value. (Record, pp. 4-7.)

The law under which plaintiff in error made his applications is Article 4218y, Revised Civil Statutes of 1895, as amended in 1897, and is as follows:

"The Commissioner of the General Land Office may withold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settle-

ment, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." (Acts 1897, p. 184.)

The Supreme Court of Texas, upon the first submission of the cause, granted the writ of mandamus (Record, pp. 12-17), but a rehearing having been granted on application of the State, upon the second submission, refused the writ upon the ground, in substance, that as to the timbered section; if the statute referred to embraced timbered land; to entitle relator to purchase, under that statute, the section of timbered land as an isolated and detached section, he was required to pay into the treasury of the State, at the time of the filing of his application, the entire purchase price in cash, which he had not done, and that as to both the timbered section and the grazing half section, the word "*may*," in Article 4218y, of the Revised Statutes, ought to be construed in its literal sense, that is to say, as a word merely conferring a power upon the Commissioner to sell the lands therein specified at $1.00 per acre, and not as making it obligatory upon him to do so. The court further held in the opinion, though the decision does not seem to have expressly rested upon such holding, that the statute in question did not embrace, nor apply to, timbered lands. (Record, pp. 21-24.)

It will be seen from the foregoing statement, taken from the printed record of the cause, that no question of the violation of a contract was presented in the cause, and certainly no question as to whether any law of the State of Texas, having any relation to this case, impaired the obligation of a contract within the meaning of Article 1, Section 10, of the Constitution of the United States. The State of Texas had enacted certain laws regulating the sale of her public domain, and the only question presented by the pleading in this case, or the decision of the court, was as to whether the relator, under those laws, had such an absolute right to purchase the lands in question upon the terms and conditions named in his applications, as set out in his petition, as left the Land Commissioner no discretion, but required him to accept the applications and to award relator the lands.

In the original application for the writ of error to this court, which was presented to, and allowed by, the honorable chief justice of the Supreme Court of Texas, the ground of the application is stated to be that by the judgment of said court there "was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege and exemption severally set up or claimed under the said clause of said Constitution." (Record, p. 31.) Relator, in his petition to the Supreme Court of the State, claimed that under the statute in question he had a right to buy the lands described in his application for one dollar per acre, upon the terms of payment of one-fortieth

of the purchase money in cash and the balance in thirty-nine annual installments, with annual interest at 3 per cent., and that the Land Commissioner had no discretion to accept or reject his application, but was required to accept his application and award him the land. The Supreme Court held, construing the statute in connection with other provisions of law for the sale of public lands, and especially timbered lands, that by the use of the word "may" in the statute in question the Legislature intended not to command or to require the Commissioner of the General Land Office to sell the lands referred to at $1.00 per acre, but to authorize him to do so, leaving him the discretion to reject or to accept applications to buy at that price.

No Federal question is involved, nor has there been, by the construction placed upon the statute by the Supreme Court of the State, any impairment of the obligation of a contract between Weber and the State.

Caperton vs. Bowyer, 14 Wall., 216.

Steines vs. Franklin Co., 14 Wall., 15-20.

Louisiana Waterworks vs La. Sugar Co., 125 U. S., 29-38.

Dugger vs. Bocock, 104 U. S., 596-603.

The only question raised or decided in the State court was as to the construction of a statute of the State, towit: whether under Art. 4218y, Revised Statutes, the Commissioner had a discretion to sell, or to refuse to sell the lands referred to, upon relator's application.

Insurance Company vs. the Treasurer, 11 Wall., 204-208.

Yazoo & Miss. R. R. Co. vs. Adam, 180 U. S., 41-44-45.

It is not claimed by the plaintiff in error that there is in this case any question of a statute of the State which impairs the obligations of a contract. His claim in substance and effect is that the judgment of the State court impairs the obligation of what he claims to be a contract arising out of his applications to purchase the land under the statute in question; that his applications under that statute constituted a contract between the State and himself, and that the decision of the State court denying that he had an absolute right to purchase under the statute—that is, denying that his applications, in connection with the statute, constituted a contract between himself and the State, impaired the obligations of such contract, in violation of the provisions of the Federal Constitution prohibiting the passage by the State of any law impairing the obligations of contracts.

The sole question involved is a correct interpretation of a statute of a State,—Was Weber entitled, under the statute in question, to purchase the land embraced in his applications at the price and upon the terms stated therein, and was this an absolute right, which the Land Commissioner had no discretion to refuse him?

"What is the true interpretation of any statute passed by a State for a purpose specified, and what acts will be justified under the statute, are matters

which lie exclusively within the determination of the highest court of the State."

Aicardi vs. State, 19 Wall., 636.
Congdon vs. Goodman, 2 Black, 574.

"Where a party claims below wholly in virtue of the laws of the State, and the highest court of the State decides that under these laws the claimant has no case, no writ of error lies here."

Worthy vs. The Commissioners, 9 Wall., 611.
R. R. Company vs. McClure, 10 Wall., 511.

"This court cannot entertain jurisdiction of a case from a State court because the *judgment* of that court impairs, or fails to give effect to, a contract."

Knox vs. Exchange Bank, 12 Wall., 379.

"In order to come within the provisions of the Constitution of the United States, which declares that no State shall pass any law impairing the obligations of contracts, not only must the obligations of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only."

Central Land Co. vs. Laidley, 159 U. S., 103, 109.

"In the case before us the proceedings were under the Louisiana law. And the opinion of the court, according to the practice of this State, is entered on the record, and sets forth the principles of law upon which the decision was made. And it appears that the decision turned upon the construction (not the validity) of the Act of Mississippi of 1840, and upon

a question of merely local law concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act and the opinion clearly shows that no such question was raised or decided. The writ of error must, therefore, be dismissed for want of jurisdiction."

Grand Gulf R. R. & Banking Co. vs. Marshall, 12 Howard, 166-168.

There was no question of the repugnancy of the statute in question, or any statute of the State, to any provision of the Federal Constitution in this case.

"The appellate jurisdiction of this court upon writ of error to a State court, upon the ground that the obligation of a contract has been impaired, can be invoked only when an act of the Legislature alleged to be repugnant to the Constitution of the United States, has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court. * * * If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction."

Central Land Co. vs. Laidley, 159 U. S., 103, 109-110.

If there was a Federal question it was not raised and presented by the complaining party, and no

reference thereto is made until the motion for rehearing.

Smith vs. Hunter, 7 Howard, 740.

Grand Gulf R. R. & Banking Co. vs. Marshall, 12 Howard, 166.

Hamilton Co. vs. Mass, 6 Wall., 632.

Schuyler National Bank vs. Bollong, 150 U. S., 85-89.

Mallet vs. North Carolina, 181 U. S., 589, 600-601.

Eastern Bldg. Association vs Welling, 181 U. S., 47-48-49; and cases cited.

Turner vs. Richardson, 180 U. S., 87, 91-92.

Meyer vs. Richmond, 172 U. S., 82-92.

The allowance of the writ of error upon the ground stated in the application therefor is not conclusive to show that a Federal question was raised in the case.

Caperton vs. Bowyer, *supra.*

Powell vs. Brunswick County, 150 U. S., 439.

The Supreme Court of Texas, in deciding the case, construed the statute substantially as the Land Commissioner had done in rejecting Weber's applications. If the judgment of the Supreme Court in such construction was an impairment of the obligation of any contract which Weber may have had with the State in violation of the Federal Constitution, the action of the Land Commissioner was equally so, and rel. r's petition to the Supreme Court should have so stated. It is submitted that this brings this case within the rule announced in—

Winona & St. Peters Land Co. vs. Minn., 159 U. S., 540; and

Morrison vs. Watson, 154 U. S., 115.

The decision of the State court rests upon two propositions:

1. In view of the peculiar provisions of the statutes of the State with regard to the sale of timbered land, and of timber upon such lands, the provisions of the statute in question in this case (Art. 4218y, R. S.) were not intended to embrace, nor apply to, timbered lands.

2. The word "may" in said statute, in view of the provisions of the statutes generally with regard to the sale of public lands, was intended to authorize or permit, but not to require, the Commissioner of the General Land Office to sell isolated and detached sections of land at $1.00 per acre.

These points are not within the purview of Section 25 of the Federal Judiciary Act, and are broad enough to sustain the judgment.

Rector vs. Ashley, 6 Wall., 142-147.

This court must accept the meaning of the State enactments to be that found in them by the State courts. The State court found, that under the facts stated in the petition, and the statute under which the applications were made, there was no contract on the part of the State to sell the lands to relator upon these applications.

Louisville & Nashville R. R. Co. vs. Kentucky, 183 U. S., 503-8.

As a matter of propriety and right the decisions of the State courts as to what are the laws of the State is binding upon those of the United States.

Town of South Ottawa vs. Perkins, 94 U. S., 260-268.

It is respectfully submitted that the writ of error should be dismissed. If this court, however, should hold that it has jurisdiction, then it is submitted that the judgment of the Supreme Court of Texas should be affirmed, without further argument, as prayed for in this motion.

C. K. BELL,
Attorney General of the State of Texas,
Counsel for Chas. Rogan, Commissioner General Land Office, Defendant in Error.

1417

No. 107.

Brief for Deft in Error

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1902.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

14173

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BRIEF FOR DEFENDANT IN ERROR.

As to the jurisdiction of this Court:

Defendant in error has filed a motion to dismiss on the ground that this court has not jurisdiction, and with such motion a brief and argument in support thereof.

On page 33 of the printed brief of counsel for plaintiff in error it is said:

"Now we understand the principle of law to be that if the judgment of the State court gives no effect to subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

In order to bring this case within the jurisdiction of

this court it is then said, following the foregoing statement:

"Now it is true that the Supreme Court of Texas in its first opinion refers to the amending Act of 1899 only once to show the true meaning of the Act of 1897 and the change which was intended to be made by the Act of 1899, and places its decision in its last opinion distinctly on the ground that no contract existed between plaintiff in error and the State, notwithstanding his compliance with all the requirements of the statute. But at the same time it would appear to be equally clear that the judgment of the Supreme Court of Texas under its last opinion gives effect to the subsequent statute—a retroactive effect—whereby plaintiff in error's contract was violated, and it has been repeatedly held by this court that in reviewing the judgment of a State court it is not limited to a mere consideration of the language used in the opinion of the State court, but may examine and determine what is the real substance and effect of the decision, and should this court find that the effect of such decision is to give such force to subsequent legislation as to impair contracts made under former legislation, then a Federal question in presented, of which this court will take jurisdiction."

This is the statement of the whole case of plaintiff in error on the point of the jurisdiction of this court. An analysis of it affords a complete answer to it.

The applications to purchase of plaintiff in error were made under the provisions of that section of the Act of 1897 which reads as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated

and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter."

The contention of plaintiff in error was that this statute required the Commissioner of the General Land Office to sell isolated or detached sections and parts of sections, whether agricultural, grazing or timber land to any applicant to purchase the same, at one dollar per acre, of which one-fortieth was to be paid in cash, and the obligation of the purchaser given for the payment of the balance in annual installments of one-fortieth.

It was further his contention that this was a positive command of the statute, which left the Land Commissioner no discretion; that his duty to accept the applications to purchase of plaintiff in error was a mere ministerial duty, the performance of which should be compelled by the Supreme Court by writ of mandamus.

In the first opinion the Supreme Court agreed with these contentions of plaintiff in error and awarded the writ of mandamus.

A rehearing having been granted, after reargument the Supreme Court reversed this ruling and adopted an entirely different construction of this statute, holding that the statute did not require or command the Commissioner to sell isolated sections at one dollar per acre without actual settlement, but only authorized him to do so, leaving him a discretion to accept or reject the applications to purchase.

It necessarily follows from this construction of the terms of the statute that such isolated sections "may be sold," etc.; that the applications of plaintiff in error to purchase, not accepted by the Land Commissioner, did not constitute contracts of purchase and sale between himself and the State.

The Legislature, at its session in 1899, amended the section of the Act of 1897, hereinabove quoted, so as to read as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for

the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement; but such lands shall be held for settlement and sold to actual settlers only under the provisions of this chapter; and all surveys and fractions of surveys in all counties organized prior to the first day of January, 1875, which surveys are isolated and detached from other surveyed school lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than one dollar per acre, upon the same terms as other public lands are sold under the provisions of chapter 129 of the Acts of 1897."

It will be seen that the only change material to the question involved made in the Act of 1897 was to substitute for the terms "at one dollar per acre" the terms "at not less than one dollar per acre."

The Supreme Court in its first opinion granting the mandamus refers to this Act of 1899 as furnishing a reason for the construction of the Act of 1897 under which the applications were made.

In the second opinion and judgment refusing the mandamus no reference whatever is made to this later Act of 1899.

The second opinion and judgment are based entirely, as were the first, upon the section of the Act of 1897, to which, without reference to the later act, the Court gave a construction adverse to the claims and contentions of plaintiff in error.

No effect was given—in the very nature of things no effect could have been given—to the Act of 1899 in deciding this case.

The contention, then, of plaintiff in error on page 33 of his brief, that "the judgment of the Supreme Court under its last opinion, gives effect to the subsequent statute—a retroactive effect—whereby plaintiff's in error contract was violated," is not supported by the record; on the contrary is distinctly contradicted by both the opinions of the Supreme Court, and especially the opinion adverse to him which is here appealed from.

If the Court had given any force or effect whatever to the Act of 1899 in deciding the case, there would have been no need for construction of the Act of 1897. No argument would have been necessary to show that the Land Commissioner had a discretion to fix the price at any sum not less than one dollar per acre, under the Act of 1899, and a right to refuse to sell to plaintiff in error, unless the price offered, in his application, was satisfactory.

If the Court had intended to give any effect whatever to the Act of 1899, a mere reference to the terms of that act would have been a sufficient answer to the claim of plaintiff in error.

On the contrary, in the judgment and opinion appealed from, the court reviews, briefly, the entire previous legislation upon the subject, and arrives at the conclusions—

1. That if relator had the absolute right to purchase the timbered sections under the Act of 1897 for one dollar per acre, he could only perfect his right by tendering the entire purchase money in cash which he had not done.

2. That the word "may," as used in the act, merely conferred a power upon the Commissioner to sell the lands therein specified at one dollar per acre, and did not make it obligatory upon him to do so.

Of course, if the statute did not make it obligatory upon the Commissioner to sell at the price offered, the applications of plaintiff in error to buy at that price could not have constituted a contract between himself and the State.

Thus we see that it is clear that no effect whatever was given to the subsequent legislation embodied in the Act of 1899 herein quoted, and as plaintiff in error rests his whole claim of the jurisdiction of this court upon the opposite contention, such claim cannot be sustained.

The facts of this case do not bring it within the rule laid down in McCullough vs. Virginia, 172 U. S., and Houston & Texas Central R. R. Co. vs. Texas, 177 U. S., cited by counsel for plaintiff in error, but do bring it clearly within the rule annonnecd by this court in Central Land Co. vs. Laidley, 159 U. S., 103-109-110.

In connection with this statement of counsel above referred to, on page 33 of this brief, it is significant that when they come to discuss the opinion of the Supreme Court and the judgment refusing the writ of mandamus, no reference whatever, in their argument, is made to the Act of 1899, but the entire discussion turns upon what is alleged by counsel to be the erroneous interpretation, by the court, of Art. 4218y in the Act of 1897 under which the applications were made.

The entire argument upon the merits of the case shows conclusively that the ruling of the Supreme Court of Texas rested upon its construction of the Act of 1897, without reference to any subsequent legislation.

Indeed, the printed brief and argument of counsel for plaintiff in error, upon the proposition that plaintiff in error was entitled to the writ of mandamus, and that the Supreme Court of Texas erred in its judgment refusing the writ, affords a sufficient and conclusive answer to the statement on page 33, upon which alone counsel rest their plea that this court has jurisdiction, that the Supreme Court of Texas, in its judgment, gave effect to the subsequent Act of 1899.

II.

Should this court follow the construction placed by the Supreme Court of the State upon the section of the Act of 1897 under which the applications were made?

On page 37 of the brief of plaintiff in error counsel say:

"While it is undoubtedly the general rule of this court to accept the construction placed by the court of a State upon its statutes, yet one exception to this rule has always been recognized, and that is in reference to the matter of contracts alleged to have been impaired."

If this court should hold that there is presented here a question of the impairment of a contract by any law of the State of Texas, which gives this court jurisdiction and brings the case within the one exception to the general rule of this court to accept the construction placed by the court of a State upon its own statutes, it will then

devolve upon this court to determine what was meant by the Legislature of the State in providing, by the Act of 1897, that "all sections and fractions of sections * * * isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this act."

In interpreting this provision the court will find it necessary to take into consideration, not only the entire article of the statute in which this provision is made, but this entire act and all other previous legislation upon this subject. And it will be necessary further, in order to arrive at the intention of the Legislature, as expressed in the act, to take into consideration the nature and characteristics of the particular subject of this legislation.

All of these matters were considered by the Supreme Court of Texas, and had to be considered, in arriving at a just and proper conclusion as to the legislative intent.

In this view, we do not think that we can do better than to quote the language used by this court in its opinion in the late case of Wilson vs. Standifer:

"But as the general rule is," says Mr. Justice Shiras, speaking for the court, "that the interpretation put on a State Constitution or laws by the Supreme Court of such State is binding upon this court, and as our right to review and revise decisions of the State courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the State court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power, or relating to the State's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special

function is to expound and interpret the State enactments." (Wilson vs. Standifer, 184 U. S., 309–412.)

III.

The Supreme Court of Texas correctly construed the statute (Art. 4218y, Revised Statutes of 1895, as amended by the Act of 1897), in holding that under this law the Land Commissioner was not required to sell isolated sections of land at the price and on the terms prescribed, but was only authorized to do so, and was vested with a discretion to sell or not to sell.

In announcing the conclusion arrived at, the Supreme Court in the opinion says:

"For these reasons the majority of the court are of the opinion that the word 'may' in Article 4218y of the Revised Statutes ought to be construed in its literal sense—that is to say, as a word merely conferring a power upon the Commissioner to sell the lands therein specified at one dollar per acre, and not making it obligatory on him to do so."

The reasoning of the court in the opinion leading to this conclusion, based upon the language of the particular article of the statute in the light of the general legislation upon the subject, the general history of such legislation in this State, and the nature of the subject matter of the particular legislation, might be cited as a sufficient answer to every statement and argument advanced by counsel for plaintiff in error upon this point.

Isolated and detached sections of school land were sections which did not at any point in their boundaries join or touch other public lands—that is, other lands belonging to the State. These were never at any time a fixed quantity, nor was the status of isolation fixed. By the sale of other adjoining sections any section might become at any time an isolated and detached section. On the other hand, by the forfeiture of adjoining sections previously sold, and reclaimed by the State, under the provisions of the statute for default in the payment of the interest, or failure to comply with the laws as to three

years occupancy, a section isolated at one time might become attached to another section of public land, losing its status as isolated. This process was, in fact, continually going on.

The Land Commissioner was required by the provisions of section 3 of the Act of 1895 (which is still the law), "from time to time, as the public interest may require, cause any or all of the lands belonging to the several funds mentioned in this act, to be carefully and skillfully classified and valued that have not heretofore been classified and valued."

It was his duty to do this with reference to isolated sections as well as others, by the plain terms of the law, and for the reason that he could not tell when he would be called upon by a change in its status to deal with a section hitherto isolated as not isolated. An additional reason was that isolated sections were subject to be leased, as well as other sections. The law provided (Art. 4218r, Revised Statutes) that agricultural lands and lands having permanent water on them should be leased for a term of five years or less, and dry grazing lands for not more than ten years.

A great many, probably the greater portion, of the isolated sections referred to in the statute have become, under the process before referred to, isolated after they had been properly classified and valued.

It will readily be seen, therefore, that the Commissioner had official knowledge of the classification, whether agricultural, grazing or timbered of each isolated or detached section, and that the legislature in vesting him with the discretion to sell these lands, under the provision that they "may be sold, etc.," assumed that he had official as well as actual knowledge of the classification and value of the lands described, and intended that he should exercise the power conferred upon him, in the light of his knowledge of the value and character of the lands.

Under the provisions of the Acts of 1887 and 1895 with regard to isolated sections the Commissioner was authorized to sell "*at not less than two dollars per acre.*"

Although no difference was made in the *minimum* price

based upon the classification of such lands, as grazing or agricultural (or timbered if timbered lands were intended to be included) nevertheless in fixing the price the Commissioner was necessarily required to have some knowledge of the character and value of the different sections.

The classification required did not have reference solely to their character as agricultural, grazing or timber lands, but had reference also to all of the various elements which could affect the value, as will be seen by reference to Sections 3 and 4 of the Act of 1895 (on pages 58 and 59, brief of plaintiff in error), which is substantially the same as the provisions on this subject in the Act of 1887, and was not changed by the Act of 1897.

Counsel for plaintiff in error insist that for the reason that, no provision having been made by which the Commissioner could be officially advised of the value of isolated sections, therefore it was not intended by the legislature to confer upon him any discretion as to the price. The premise is incorrect and the conclusion fails.

Counsel refer (on pp. 52 and 53 of their brief) to the cases of Eastin vs. Ferguson, 4 C. A., 643, and Cameron vs. State 7 C. A., 37, as instances of sales for prices *fixed by law.* The law under which these sales were made did not purport to fix the price, but only a minimum of two dollars per acre, and the sales *had been actually made by the Commissioner, at a valuation fixed by him under the law.*

There is nothing in either these two cases or Thomas vs. Wolfe, 16 C. A., 22, or Shaver vs. Tinsley, id., 369, to sustain the contention of plaintiff in error. In each of these cases sales of isolated sections *had been actually made* by the Commissioner without actual settlement which were attacked, in one case by the State and in the other three by subsequent applicants to purchase, mainly on the ground that the lands so sold were not in fact isolated sections, and the Commissioner was not authorized to sell except to actual settlers.

"The point at issue in this case; whether the Commissioner was only *authorized* to sell, or was *required* to sell without discretion, at the price; was not raised, and necessarily could not have been raised or decided, in either

case." It is to be noted that Mr. Justice Williams who delivered the opinions in Eastin vs. Ferguson and Thomas vs. Wolfe referred to the brief of plaintiff in error was a Justice of the Supreme Court by which the case at bar was decided and with Mr. Justice Brown constituted the majority of the court referred to by the Chief Justice in the opinion.

It has been held in several cases decided by our courts of Civil Appeals (but not directly in any case by our Supreme Court) that an application to buy school lands generally, as an actual settler, made in full compliance with every requirement of the statute conferred title upon the applicant, regardless of the action of the Land Commissioner in accepting or rejecting his application.

These cases were all upon a statute essentially different in its language and provisions from that under which the applications of plaintiff in error were made.

These decisions rest upon the provisions of section 9 of the Act of 1895 and a similar provision of the Act of 1887 (pp. 60-63, brief of plaintiff in error). This section prescribes very particularly the conditions of sales to actual settlers, the form of the application, etc., and concludes as follows:

"The purchaser shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office."

As conclusively showing that these provisions were not intended to apply to or control sales of isolated sec-

tions under section 26 of the Act, and section 22 of the Act of 1887, the applicant is required to transmit to the Treasurer one-fortieth of the purchase price and to the Land Commissioner his obligation binding him to pay the State on the first day of November of each year thereafter until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at five per cent.; and also his affidavit as prescribed, showing actual settlement, which being done the sale was thereby perfected.

These provisions could not have been intended to apply to sales of isolated sections which did not require any affidavit of actual settlement, etc., and as such sales were to be made "on such terms as the Commissioner may prescribe," the amount of cash to be paid, and the terms as to time of payment of the obligation, could not be known until these were fixed by the Commissioner.

We think it is clear that, having provided generally for the sale of lands to actual settlers, fixing the time and conditions of such sales, and making the sale effective by the filing of the application and obligation and the payment of the installment of purchase money required to be paid in cash without action of the Land Commissioner, except to file the papers, the Legislature then authorized the Land Commissioner, in his discretion, to sell isolated sections without actual settlement, and on such terms as he might prescribe, except as to the price, which could not be less than two dollars per acre under the Acts of 1887 and 1895, and one dollar per acre under the Act of 1897.

If the Commissioner was to have a discretion to sell or not to sell at the price offered, it mattered little, in fact nothing at all, that by the Act of 1897 the price was named at one dollar per acre.

On page 48 of brief for plaintiff in error occurs the following statement:

"But by the general appreciation of lands all over the State, resulting from high prices of all agricultural, ranch and dairy products, and the increase in the price of lumber, even these remnants of lands known as isolated and

detached sections, increased in price, and the Legislature, when it met in 1899, promptly repealed the Act of 1897, by which these lands could be sold at one dollar per acre."

Reference to the Act of 1899 will show that the Legislature did not repeal the section of the Act of 1897 (Art. 4218y) referred to by which these lands could be sold at one dollar per acre.

These lands could as readily be sold for one dollar per acre under the Act of 1899 as under the Act of 1897. The only amendment or change in the statute was to make clear and beyond dispute that the one dollar per acre was not the fixed price, but that the Land Commissioner might refuse to sell at that price, and demand a higher price, if in his discretion it was proper to do so.

The Land Commissioner had, in fact, been construing this Act of 1897 as giving him this discretion, but as the language of the Act of 1897 and the change from "not less than two dollars per acre" to "one dollar per acre" was liable to raise a question as to its proper construction, the amendment by the Act of 1899 was suggested to the Legislature by the Commissioner of the General Land Office himself and for this reason only. (See letter of Land Commissioner to the Attorney General appended to this brief.)

That the general "appreciation of lands all over the State, resulting from high prices of all agricultural, ranch and dairy products, and the increase in the price of lumber," had nothing to do with the amendment of 1899 is sufficiently shown by the fact that the Legislature made no change, and has made none since the Act of 1897, in the minimum price of agricultural, grazing or timbered lands, or in timber upon timbered lands.

The emergency clause of the Act of 1899 really shows that the Legislature did not give to the Act of 1897 the construction here contended for, but gave as the reason for the passage of the act that "the present law *would seem to prevent* the sale of them for more than one dollar per acre, *except in case of voluntary offer*."

There is nothing in the emergency clause to support the contention of counsel (on p. 44 of their brief) that the

Legislature construed the Act of 1897 as *requiring* the Commissioner to sell isolated sections at one dollar per acre. As a matter of fact, the Commissioner had not so construed it, nor was it ever contended that such was the proper construction of the act until this emergency clause of the Act of 1899 gave the hint that the act "would seem" to be susceptible of such construction.

The authority of Smisson vs. The State, 71 T. R., 222, was insisted upon in the State court and is insisted upon here.

It may be said that its value as authority for the contention of plaintiff in error in this case is destroyed by the decision of the same court herein.

An examination of that case, however, shows that it could never have been considered as an authoritative decision of the point involved in this case.

In the Smisson case the Land Board created by the Act of 1883, under the provision of that statute, which declared that "pasture lands * * * may be leased * * * for not less than four cents per acre," undertook to fix a minimum price at one time at eight cents, at another six cents for dry sections, and at twenty cents for watered sections.

The court, in effect, held that the board had no authority, by any regulation of its own, to change the minimum price fixed by the Legislature, but were required to lease at four cents, if no higher price was obtainable, quoting and italicizing for emphasis the following mandatory language of the act:

"There shall be and is hereby created a State Land Board * * * *who shall exercise the powers and perform the duties hereinafter prescribed.*"

From this language and the general context of the entire act the court arrived at the conclusion that the language "may lease at not less than four cents per acre" required the board to lease at that price, if no higher rent could be had, the case really turning, however, upon the power of the Land Board to fix a higher minimum rental, by their own regulations, than that fixed by the law. Whether the word "may" is to be construed as "shall," a

word of command, instead of a word of permission, its usual signification, is to be determined, according to the opinion of the court, in all cases from the context of the act—that is, according to the legislative intent to be gathered from the entire act.

Counsel make the same mistake in their argument that was made by the Supreme Court in its first opinion in treating isolated and detached sections of land as a fixed quantity, and ignoring the process daily going on, by which isolated sections are becoming attached and attached sections becoming isolated and detached from other public lands.

Referring to the Act of 1897 (on page 48 of brief), inadvertently, no doubt, counsel make the statement that "The law is emphatic and unambiguous in its declaration that all isolated and detached sections and fractions of sections *shall* be sold at one dollar per acre."

The language of the act, in fact is, that such sections *may be sold* at one dollar per acre. This language cannot be said to convey an emphatic and unambiguous command to the Land Commissioner to sell at that price. The Land Commissioner did not construe the language as mandatory, but as permissive. This practical construction of the act by that department of the State government, whose duty it was to administer the law, under the settled rule of the construction of statutes, is entitled to great weight in any case and in a doubtful case, or where the language of the act is susceptible of the interpretation given it, is conclusive upon the courts.

Pennoyer vs. McConnaughy, 140 U. S., 1.

United States vs. Moore, 95 U. S., 760.

U. S. vs. Alabama, etc., R. R., 142 U. S., 621.

That this construction was placed upon the act by the Land Commissioner is sufficiently shown by the record, in his refusal to accept the applications of plaintiff in error in this case, for the reason, in case of the timbered section, that it was valued at eight dollars per acre (Record p. 8), and the grazing half section, that it was valued at two dollars per acre. (Record p. 11.)

For further evidence as to this construction we refer

to the letters of the Land Commissioner attached to the brief of respondent, in the Supreme Court, upon the motion for rehearing, and which we have taken the liberty of appending to this brief

IV.

So far as the timbered section is concerned, the mandamus was properly refused by the Supreme Court of the State for the reason that plaintiff in error did not comply with the law upon any construction of it, in that he did not tender the purchase price in cash as required in sales of timbered lands.

The Act of 1897 under which the applications were made authorized the sale of isolated sections at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

Section 9 of the Act of 1895 (p. 63 of brief of plaintiff in error, last clause of the section), after providing for the payment of one-fortieth of the purchase price of lands sold and execution of obligation for the balance, provides as follows: "Provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase."

It may be remarked that ever since the Act of 1883 timbered lands have been sold only for cash.

So that, if the Commissioner was required without discretion to accept an application to purchase an isolated section of timbered land at one dollar per acre, clearly the applicant was only allowed to buy on the same terms as other timbered lands were sold, that is, for cash, and his application not having been accompanied by a payment to the Treasurer of the entire purchase price in cash, was properly refused by the Land Commissioner, as held by the Supreme Court.

It does not matter that the Commissioner based his rejection of the application on other grounds. (Willoughby vs. Townsend, 93 Texas, 82.) Counsel for plaintiff in error insist, it is true, that this cannot be the law, because the Land Commissioner had no means of knowing,

officially, that this was a timbered section, but we think that we have shown that that position is not tenable.

V.

The law with regard to the sale of isolated and detached sections was not intended to apply to timbered land.

Reviewing the entire legislation upon this subject, in the light of known prevailing conditions of the subject matter of the legislation under discussion, the Supreme Court of Texas concluded that the statute providing for the sale of isolated and detached sections was not intended to apply to timbered lands, but only to lands classed as grazing or agricultural.

Detached sections of agricultural and grazing lands in counties organized prior to the first day of January, 1875, that is, in all of the older counties (except El Paso, Pecos and Presidio) might very well have been supposed by the Legislature to be of small value, not desirable for settlement and not readily saleable except for a low price and without the condition of actual settlement. That this was not the conditions with regard to timbered lands belonging to the school fund, was a matter of common knowledge.

It appeared that the isolated timbered section involved in this case had been valued at eight dollars per acre. (Answer of Respondent Rogan, Record, p. 5.) It must be understood, only land that was chiefly valuable for the timber thereon was classified as timbered land. It is hardly conceivable that the Legislature should have intended that lands chiefly valuable for the timber thereon should have been sold for one dollar per acre.

We have taken the liberty of appending to this brief copies of two letters from the Commissioner of the General Land Office, one addressed to the Attorney General and the other to the Governor of the State, and which were attached to the printed argument of the Attorney General on the motion for rehearing in the Supreme Court in this case. We submit that they may, with propriety, be considered by this Court, as they were by the

State Supreme Court, as conveying some idea of the condition and value of the isolated sections of timbered lands belonging to the free school fund of the State. The Legislature could not have been ignorant of these conditions, and this gives force to our contention that all timbered lands, whether detached or otherwise, were to be sold under the special provision with regard to such lands, and not otherwise. These letters were written after the first decision by the Supreme Court.

Summing up the argument for defendant in error, we respectfully submit to the Court:

1. There is no Federal question involved to give this Court jurisdiction, and the motion to dismiss should be sustained.

2. If this Court has jurisdiction, the question being as to the construction of a statute of Texas relating to the sale of her public lands, the construction placed upon such statute by the Supreme Court of the State should be accepted.

3. If this Court concludes that it has jurisdiction; independently of the authority of the decision of the State Court, the mandamus prayed for should be refused,

(a) Because by the use of the word "may" in the statute under discussion, the Legislature intended to authorize the Land Commissioner to sell isolated and detached sections of land at one dollar per acre, leaving it to his discretion to sell at that price or to refuse to sell.

(b) Because the statute in question was intended to apply to agricultural and grazing lands alone and not to timbered lands.

(c) Because, as to the timbered section, the applicant was entitled to buy only upon payment to the Treasurer of the entire purchase price in cash, failing in which his application was properly rejected by the Land Commissioner.

C. K. Bell

Attorney General of Texas,
Attorney for Charles Rogan, Commissioner of the General Land Office, Defendant in Error.

APPENDIX.

Letter of Commissioner General Land Office Referred to in Brief.

Hon. T. S. Smith, Attorney-General, Austin, Texas.

DEAR SIR: Having carefully read the opinion of the Supreme Court in the case of P. O. Weber against myself as Commissioner of the General Land Office, and being strongly impressed with the opinion that the court has erred in arriving at its conclusions, I respectfully request you to file with the court in said cause a motion for a rehearing.

My reasons for this belief are given below:

The law under which the relator bases his right to purchase the most valuable lands in the State belonging to the public school fund at one dollar per acre, was passed in 1897, and is as follows:

Article 4218y. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

The question arises, what land did the Legislature intend to authorize the Commissioner to sell? What was the intention of the Legislature by the passage of that section? Was it the intention of the Legislature to deprive the Commissioner of all discretion in selling lands that should become isolated and detached by reason of having

made sales of other lands adjoining them and without any regard to their value, or however shocking to the conscience; or did it intend by the use of the word "may" to lodge with him some discretion, so that the public interest could be protected in making or refusing sales? It will be observed that this section is an amendment to Section 26 of the Act of 1895.

To determine these questions it is necessary to look: 1. To the Legislature and its surroundings. 2. To the topography of the country and to the location of the public school lands and their value. 3. To the general and local knowledge of the several members of the law-making body of the location and value of the public school lands, their accessibility to the Commissioner of the Land Office for information, and to the records of the office showing the location and value of such lands. 4. To Sections 7, 9, 16 and 26 of the Act of 1895; Section 22 of the Act of 1887, and Sections 4218h, 4218s and 4218y of the Act of 1897.

The several members of the law-making body represent every section of the State, and must be deemed and held to know the condition, location and the value of the public free school lands. All bills introduced into the Legislature are referred to the proper committees for investigation and consideration. Being public officers, the law will presume the committees fully informed themselves as well as the Legislature with regard to the subject matter and of the results that are likely to follow the passage of any bill affecting the public interest. I think it is also safe to presume that the Legislature being representatives of the people, in passing laws governing the disposition, sale and lease of the public free school lands, did so with a view of promoting the public interest instead of subserving the interest of a few speculators.

It was evidently the intention of the Legislature not to impair but to build up the permanent school fund. It is a fund in which every man, woman and child in the State has an interest.

In 1895 the Legislature passed a general land bill in lieu of all other laws regulating the disposition, sale and

lease of the public free school lands, and especially prescribing the manner of sales and terms of sale of timber, and of land valuable chiefly for the timber thereon.

When the Acts of 1887, 1895 and the amendments of 1897 were enacted, what were the conditions and what did the Legislature know? It must have known at the time the several bills were being considered that in nearly every county in the State the public school fund owned some lands, but that the great body of its lands is situated in the pineries of East Texas and on the plains of West Texas. It knew that thousands of acres in West Texas, so far as agricultural and grazing purposes are considered are absolutely worthless, and, for such purposes, can never be sold. It knew that in many of the older counties of the State nearly all of the public school lands of any value had been sold; that those remaining unsold, although classed as such, were not desirable for either grazing or agricultural purposes; that they were isolated and detached from other public school lands, and that neither the State nor the available school fund were deriving any benefit therefrom. It further knew that the most valuable lands in the State, belonging to the school fund, lie in the pineries of East Texas, timbered with both short and long leaf pine on which the stumpage would run from 3,000 to 12,000 feet of choice lumber to the acre, worth from seventy-five cents to one dollar per thousand feet, or from two to twelve dollars per acre; that many of these sections were isolated and detached from similar sections in the same counties, and that the records of the Land Office disclosed these facts. The Legislature, for the purpose of encouraging settlement and the utilization of the school lands so as to make them revenue producing, and at the same time and in the same Act authorizing the sale of isolated and detached tracts of land, passed laws to that effect. It also at the same time provided for the lease of all agricultural and grazing lands, but it made no provision for the leasing of timber land.

There must have been some good reason for this.

Among others, the Act of 1895 contained the following provisions:

Section 7. All lands belonging to the public free schools and the several asylum funds shall be sold at not less than two dollars per acre, except pasture lands, which shall be sold at not less than one dollar per acre, and all timber lands shall be sold at not less than five dollars per acre. By timber lands as here used is meant lands valuable chiefly for the timber thereon.

Section 9. All sales shall be made by the Commissioner of the General Land Office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office, within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy, as provided herein. Any person desiring to purchase land in accordance with the provisions of this act shall forward his application to the Commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land as a home, and has in good faith settled thereon, except where otherwise provided herein. and he shall also swear

that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right after this act goes into effect, or after the land is again placed on the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, that when any forfeiture has been made, the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. Any original purchaser or his vendee of any of the lands, the sale of which is provided for in this act, who has improved such land as a home, and who has been forced to temporarily abandon same on account of drouth and who shall in good faith reoccupy the same, either by themselves or vendees, within six months after this act goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy: provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have reoccupied the land as a home in good faith, and that they had abandoned the same since their purchase on account of the drouth and not otherwise; and such absence shall not be deducted from the three years occupancy required by law in making final proof of occupancy; and provided further, that any purchaser or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases, shall have six months after this act shall take effect to make such proof of occupancy as required by the provisions of this act. The purchaser

shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State, on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office; provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase.

Section 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of such sections, at its proper value; provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications, to be made by the Land Commissioner; provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which the timber so purchased is situated, at two dollars per acre, cash, at any time before

the expiration of five years from date of purchase of timber under the provisions of this act.

Section 17. The public lands and all lands referred to in the several funds mentioned in this act, shall be leased by the Commissioner of the General Land Office under the provisions of this act. All lands classified as agricultural and all lands containing permanent water thereon, shall be leased for a term of five years or less, at not less than three cents per acre per annum, and all lands classified as pasture or dry grazing lands shall be leased for a term of not more than ten years, at not less than two cents per acre per annum, which rental shall be paid yearly in advance, the first payment to be made at the time the lease contract is entered into. If at the termination of any lease the lands covered thereby are still for lease, the lessee thereof shall have the preference right to again lease such lands theretofore leased by him upon the same terms and at the prices then fixed by law. * * *

Section 26. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for purposes of settlement; and no agricultural lands shall be leased if in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except a corporation, without settlement, at not less than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe.

The Twenty-fifth Legislature, in 1897, amended the Act of 1895. Article 4218h, amending Section 7, reads:

All agricultural lands belonging to the public free school and the several asylum funds, shall be sold at not less than one dollar and fifty cents per acre; and all grazing lands shall be sold at not less than one dollar per acre; and all timbered lands shall be sold at not less than five dollars per acre. By timbered lands is meant lands

valuable chiefly for the timber thereon. Provided, that the owner of land, which is in fact agricultural, purchased under former laws, and which land is not subject to forfeiture at the time this law goes into effect, shall not be permitted, in case said land is forfeited, to purchase said forfeited land from the State for a less price per acre than the contract price under the former sale.

Article 4218s, amending Section 18, reads: * * * All land which may be leased, shall be subject to sale at any time, except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made, as well as those hereafter to be made. Any section or part of a section, which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof during the term of his lease, in the following cases:

1. When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement.

2. When he has placed on such section or part of a section improvements of the value of two hundred dollars.

3. When the aggregate of the land owned by a settler and leased by him does not exceed one section.

Any lands which may be leased south and west of the line herein designated, shall not be sold during the term of the lease until otherwise provided by law; provided, the sections leased by any one party are not so selected as to detach sections which are thereby left unleased. * * *

Article 4218y, relating to the sale of isolated and detached lands, amending Section 26, reads:

Article 4218y. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all

counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

It will be observed that Section 16, of the Act of 1895, relating to the sale of lands valuable chiefly for the timber thereon, was not amended by the Act of 1897.

In 1899, upon a suggestion originating in the Land Office, to the effect that while the Commissioner had uniformly construed Article 4218y as giving him full discretion in the matter of making sales of isolated and detached land, that it might be susceptible to a double construction; and, at his instance, the article was amended by the Twenty-sixth Legislature. That Legislature in its zeal to rectify the vice in the Amendment of 1897, if in fact there was any vice at all, put the following language in the emergency clause, towit:

"SEC. 2. The fact that a great deal of the lands mentioned herein are valuable, and the present law would seem to prevent the sale of them for more than $1.00 per acre, except in cases of voluntary offer, to the detriment of the school fund, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

This language attracted the attention, when published in the press, of land agents and speculators, who immediately began the investment of the Land Office. The records of the Land Office show that from the time the language above quoted from the emergency clause of the Act of 1899 up to the 26th day of August of that year, one agent alone filed for various speculators 158 applications to purchase isolated and detached sections of land for the sum of one dollar per acre, on forty years time, at three per cent. interest. The records show that many of these sections are worth and are valued at from one to

ten dollars per acre. The total value of the lands sought to be purchased under these applications, in the counties of Angelina, Sabine, San Augustine, Jefferson, Chambers, Fort Bend, Wharton, Jasper and Tyler alone, aggregates $175,803. If the Commissioner is deprived of all discretion in the premises, every foot of this land must be sold at one dollar per acre, on forty years time, at three per cent. interest, upon the payment of one-fortieth of the principal, or $16 per section, into the treasury. To acquire full control and possession of these lands, the applicants are required to pay into the treasury in the aggregate the paltry sum of only $2,528. After once acquiring possession, the applicants have the power to continue the payment of interest on their purchases until they can sell the valuable timber thereon to mill owners, and until they have time to cut and remove the timber therefrom; and as these lands are chiefly valuable for the timber thereon, and many sections are not worth the taxes after the timber is removed, the purchasers having reaped all the benefits to be derived therefrom can, as has often been done in the past, forfeit their purchase back to the State for non-payment of interest, and as many applicants are non-residents and are otherwise wholly irresponsible, the State could never hope to recover more than the applicants themselves see fit to pay.

As before stated, the Legislature must be deemed and held to know these facts and of the consequences of depriving the Commissioner of all discretion in the sale of isolated and detached sections of land.

The question is: What was the intention of the Legislature when it said, in the Act of 1897, that all isolated and detached sections "may be sold to any purchaser," etc.? With the means of knowledge at their command and with the presumption of law that these public officials did their duty by informing themselves of the location, condition, classification and value of the public school lands, did the legislators, in framing and passing the law of 1897, intend to pass a law so direful in its consequences, so disastrous to the permanent and available public school funds, such as that which now confronts

the people of Texas, or did they intend to vest the Commissioner with some discretion in making these sales? Was it the intention of the Legislature, by the passage of Article 4218y of the Act of 1897, amending Section 26 of the Act of 1895, to materially modify or annul Sections 9 and 16 of the Act of 1895, and Article 4218s of the Act of 1897?

Ever since the passage of the Act of 1895, the Commissioner has exercised his discretion, and until the language used in the emergency clause of the Act of 1899 became public, the public, including land agents and lawyers and legislators, have acquiesced in the construction of the Commissioner of Section 26 of the Act of 1895, and article 4218y of the Act of 1897, amending Section 26, that the Commissioner did have the right of discretion.

Acting upon this theory, the Land Office has, from time to time, in cases where a speculator applies to purchase a section as detached and an actual settler on the land also makes application to purchase it, not as detached, but for a home, and if his offer is for a greater or the same price as that offered by the former, his application conforming to the classification and value, as shown on the records of the office, the office has uniformly awarded the land to him who is residing on the land, improved it and desires it for a home; and in all cases where the applications were filed on the same day.

Construing the language of the two sections relating to the sale of isolated and detached lands, and looking to the context of the Act of 1895, and as amended in 1897, the Land Office authorities have uniformly given full weight to the language used by the Legislature in the sections above quoted, relating to the sale and lease of agricultural lands and of the section prescribing the manner and conditions of sale of timber lands, and of the timber thereon.

Section 9, Act of 1895, contains the following provision: "Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right after this act goes into effect, or *after the land is again placed on the market*, to

purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, when any forfeiture has been made, the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase, given herein."

If the construction of the Supreme Court is correct in construing the word "may," in the Act of 1897, the above provision stands as a nullity in all cases where a speculator desires to take advantage of the actual settler by filing his application to purchase the land as detached, as soon as it is forfeited, but before it is again placed on the market, as is the case with the half section involved in the suit of the relator, classified as dry grazing, and valued at $2.50 per acre.

The two tracts of land involved in this suit were applied for by the relator, and suit was brought to obtain the true construction of the law under which his applications were filed, but the number of sections involved will probably amount into the hundreds, as will be shown later on. If the construction of the court is correct, the Land Office will necessarily have to go back several years and cancel sales which have been made under the prior right clause, thereby disturbing great number of titles and homes; reconsider rejected applications to purchase as detached, and make awards thereon. The Commissioner of the General Land Office has also tried to give effect to Article 4218h of the Act of 1897, above quoted, and he has uniformly declined to make sales in all cases where the lessee is in possession and has settled on the premises and erected thereon his residence and substantial improvements for permanent settlement. Also, where he has placed thereon improvements of the value of $200, and also in cases where the aggregate of the land owned

by a settler and leased by the lessee does not exceed one section; and also all lands under lease in what is known as the absolute lease territory. If the court is right in its construction, then what is to become of the people who have made improvements under their respective leases? Perhaps when they leased and put their improvements thereon, the section was not detached. Sales and forfeitures are so constant that lands detached one day may not be the next day, and those not detached one day may be the next day.

The Land Office authorities have also given effect to Section 16 of the Act of 1895, in the sale and classification of pine timber lands.

Since these applications for the purchase of pine timber lands were filed and rejected, the timber from a number of them has been sold and the money paid into the treasury. The timber alone from five sections was sold for $14,995, and the money paid into the permanent school fund. If the court is correct in its construction, the Legislature will have to appropriate the amount from all sales from said fund, and refund it to the purchasers, and the Land Office will then be required to not only sell the timber, but the land also for a cash payment of only $80, and if the land itself is worthless, there is nothing to prevent the purchasers from letting this land forfeit back to the State after they appropriate the timber therefrom. Was it the intention of the Legislature to pass a law so detrimental to the public good, and to place the school lands beyond the power of the Commissioner to protect the fund from the greed of the speculator?

The general law authorizes the sale of public school land on forty years time, but Section 16 of the Act of 1895 expressly excepts the sale of the timber lands, regardless of whether the sections are detached or connected, on any other terms than for cash. Is Article 4218y any more of an exception to the general law than Section 16? An inspection of the map will show that it is no trouble to create detached sections at will, by one who desires to take advantage of the construction given by the court to the law. By the purchase of one or more

sections for cash, he can by proper selection, cause several other to become detached. By so doing, it is plain to see how the value of the school fund can be very materially impaired by the speculator. The Legislature is supposed to have known this. Therefore, can it be presumed that it was the intention of the lawmaking body to pass a law that would place it beyond the power of the Commissoner to protect that fund? In other words, was it not the intention of the Legislature, by the use of the word "may" in that connection, to mean permissive instead of mandatory? If the language is to be construed as mandatory and not merely permissive, does it not defeat the rights of all parties for whom the Legislature intended to give some preference by a prior right to purchase for ninety days after the land is again placed on the market after forfeiture.

Is that not a special statute on that subject? And would not such a construction impair the right to a great number of people guaranteed to them under Article 4218s, which is a special statute on that subject, and a part of the same chapter and act as 4218y. The general law authorizes the leasing of all grazing and agricultural lands, but did not authorize the leasing of timber lands. Why was this? Was it not because the Legislature desired to protect the timber thereon by refusing occupancy and possession? Is not Section 16 such a special statute, relating to the sale and disposition of timbered lands, that in order to affect it by another special statute, that it also applies to isolated and detached sections of timber lands?

The court in its opinion in this case, uses the following language:

"If one had nothing but the language of the article to throw light upon the intention of the Legislature, we would therefore think it would be difficult to say that the word "may" was not used in the same sense in the second instance as it was used in the first. But when we review the history of the provision, the difficulty disappears."

It then proceeds to recite the history, and then says:

"The article so amended took away all discretion as to

the terms of sale, by providing that the sale should be upon the same terms as other public lands are sold *under the provisions of this chapter*," and that "such seems to have been the construction put upon the act by the next Legislature," etc.

"*Under the provisions of this chapter*" What are the provisions of this chapter? Section 9 of the Act of 1895, provides for the sale of all public school lands on forty years time, at three per cent. interest, upon payment of one-fortieth of the principal, and of the execution by the purchaser of his obligation for the payment of the remainder, but in that same section the Legislature expressly excepted timber lands. It says, "provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase." Timber lands are as much public lands as grazing and agricultural lands. Article 4218y says that isolated and detached sections "may be sold * * * without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." The relator in this case offered one dollar per acre for this timber land, and paid only $16—one-fortieth of his offer, when there is a special provision in this chapter requiring the applicant to pay the full amount of the purchase money at the time of his purchase. Has he done so? If not, is it not the duty of the Commissioner to reject his application? But this is not all. There is also another special provision in the same chapter governing the sale of timber lands. Section 16 of the Act of 1895 (Article 4218q, Revised Statutes, 1895), referring especially to timber lands says: "Such timber shall not be sold for less than $5 per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent, appointed by him for that purpose, to be paid by the purchaser," etc. "*Provided*, such timber is sold at not less than $2 per acre." "Provided further, that the purchaser or his vendees of such timber shall have the right to purchase the land upon which timber so purchased is situated, at $2 per acre,

cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act." This is a special provision. Did it except such as are, or may become, isolated and detached? If it was the intention of the Legislature to sell such sections as were or might become detached by the sale of other tracts, is it not reasonable to presume the Legislature would have so expressed itself?

I would respectfully ask that you invite the attention of the court especially to Section 16 of this chapter. Until the timber is first sold, can the land upon which it is situated be sold at all? Before it can be sold, must it not be first put on the market? Does not the language of this particular section preclude the idea that it can be sold before the timber is first sold? After the timber is sold, it may be sold to the purchaser within a given time at $2 per acre, cash, without classification, by a special provision, but not so to any other person. It says: "Provided, that all timbered lands from which the timber has been cut and taken off, may be placed on the market and sold as agricultural or grazing lands, according to classifications, to be made by the Land Commissioner."

It is submitted that at no time could an actual settler ever buy timbered lands for cash, for three reasons: 1. He is required to pay from four to twelve dollars per acre, cash (a great deal more money than a pioneer, who wanted to procure a home for his family, would be likely to have). 2. If it was not accessible to a mill owner, it would cost him about $25 to $30 per acre to destroy the timber and prepare the land for a state of cultivation. 3. Because, the land being valuable chiefly for the timber thereon, would not be worth the payment of the taxes after the timber shall have been removed. Therefore, is not the court in error in adopting the idea that these lands are refused lands, and are remnants, such as an old stock of goods? Was it ever in contemplation of the Legislature that lands valuable chiefly for the timber, should ever be sold for actual settlement, or as grazing lands, until the timber is first removed, so that it could be

classified, put on the market, and sold on long time, as other public lands, under a general law? Was this "the construction put on the act by the Twenty-sixth Legislature?"

Three different Land Commissioners had placed a different construction on it, and their construction uniformly acquiesced in by the public—by all applicants and their agents—until after the emergency clause to the amended act was published. Because it was possible for a different construction, the Legislature, on a suggestion originating in the Land Office, made the change, but did the Legislature place on the Act of 1897 the construction as now contended for by the relator? The language used in the emergency clause is that "the present law *would seem* to prevent," etc. Is not the language only one of doubt? And if so, in its haste to change it, it would admit of such a construction and argument that the Legislature never intended it to have been so construed?

Since the publication of the decision of the court in this case, the Land Office is being overwhelmed with letters, telegrams and applications to purchase this timber land as detached. As many as 29 applications from one man to purchase as many different sections, were received by special delivery in the Land Office within two days after the decision was published.

Very respectfully,

CHARLES ROGAN,
Commissioner General Land Office.

GENERAL LAND OFFICE.
AUSTIN, TEXAS, February 3, 1900.

His Excellency, Joseph D. Sayers, Governor of Texas:

DEAR SIR: Your attention is respectfully invited to the wording of Chapter 137, Acts of 1899, being "An Act to amend Article 4218y of Chapter 129, Acts of 1897, providing for the sale of isolated and detached lands."

This act among other things, provides that "all surveys and fractions of surveys in all counties organized prior to the first day of January, 1875, which surveys are

isolated and detached from other school lands, *may* be sold to any purchaser, except to a corporation, without actual settlement, at not *less than one dollar per acre*, upon the same terms as other public lands are sold under the provisions of Chapter 129, Acts of 1897."

The language of the Act of 1897 is identical with that of the act above quoted, with the exception that the Act of 1897 uses the words *"at one dollar per acre,"* while the Act of 1899 uses the words *"at not less than* one dollar per acre."

From the time of the emergency clause of the Act of 1899 was published through the press to the world, and the attention of the public directed to the possible double construction that might be placed on the Act of 1897, until the Act of 1899 went into effect, on the 26th of August of last year, there were filed in the General Land Office, by one agent alone, for numerous speculators, 158 applications to purchase as many isolated and detached sections of land, at one dollar per acre, offering $16 per section, or one-fortieth of the purchase price, and their obligations for the remainder, on forty years time, at three per cent. interest.

The several Commissioners of the General Land Office have uniformly construed the word "may," as used in the Acts of 1895, 1897 and 1899, relating to the sale of isolated and detached sections of school land, to be directory or permissive only, and not used in the same sense as the word "shall."

The Land Office authorities, by construing the word "may," as used in these several acts as meaning, not as an undoubted word of command, but as directory or permissive, have saved to the State permanent school fund many thousands of dollars, but which would have been irretrievably lost to that fund had they placed any other construction on that word.

As previously stated, one gentleman alone, residing in Galveston, for himself and as the agent for many others, during the months of July and August, 1899, filed applications for the purchase of 158 sections of land. As to how many applications were filed by other people during

and prior to that time, I am not informed, but most of these applications were filed on the most valuable timber lands in the State, ranging in value from four to twelve dollars per acre.

Acting upon the theory that the Commissioner had the right to exercise some discretion in the premises, and with an earnest desire to protect the school fund, and for the purpose of giving full effect to other provisions of the Acts of 1895 and 1897, regulating the disposition, sale and lease of the public free school lands, I rejected most of the applications that had been thus filed by them, for several reasons, although one reason only might have been assigned for their rejection, believing one to be sufficient, and I declined to sell thereon for the following reasons, viz.: Because some of them were valuable chiefly for the short and long leaf pine timber situated thereon, classified and valued on the records of the Land Office at from four to twelve dollars per acre; and because Section 16 of the Act of 1895, being a special act regulating the disposition and sale of such timbered lands, without specially excepting isolated and detached sections, provides that such timber lands shall not be sold for a less price than five dollars per acre, cash.

2. Because some of them had been sold prior to that Act (1895), and were forfeited in 1899 for non-payment of interest, and had not been placed again on the market, at the time those applications were filed; and because Section 9 of the Act of 1895 specially provides that "Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days' prior right, *after the land is again placed on the market*, to purchase said land, upon the payment of all interest due thereon at the time of forfeiture," and to make sales on said applications to purchase as detached lands, would deprive all former purchasers, many of whom are actual settlers and have made valuable improvements thereon, of their right under this law to purchase again, in all cases where they may have become detached by the sales of other public lands adjoining them.

3. Because Article 4218s of the Acts of 1897 especially

provides that "Any section or part of a section which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof, during the time of his lease, in the following cases: 1. When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement. 2. When he has placed on such section, or part of a section, improvements of the value of two hundred dollars. 3. When the aggregate of the land owned by a settler and leased by him, does not exceed one section," and because to sell the many sections and parts of sections as isolated and detached, would deprive a great number of people, who have acted in good faith under said statute, of the rights, privileges and possession intended to be vouchsaved to them by said statute.

Acting upon the idea that it was the evident intention of the Legislature to lodge some discretion with the Commissioner of the Land Office, in the sale of isolated and detached lands, and after rejecting said applications, I proceeded to sell the same. First. In accordance with its classification and value, as shown by the records of the office, giving preference to actual settlers, in so far as I believe that I had the authority so to do. Second. To sell the pine timber at its appraised value, and for cash only. Third. And I then declined to make sales altogether where the sections were isolated and detached, and where they were leased and came within the exceptions named in Article 4218s of the Act of 1897, as above quoted.

The value of the land applied for as isolated and detached, by this one gentleman alone, for himself and others, aggregates $175,803.

Of the number of timbered sections applied for, I sold the timber on five sections for the sum of $14,995, cash, and the money has been paid into the permanent school fund.

One of the parties for whom these applications were filed to purchase this land, as isolated and detached sections, at one dollar per acre, on forty years time, after

his applications were rejected, filed, in the Supreme Court, an application for the issuance of a writ of mandamus against myself as Commissioner, to compel me to award said lands to him, on the terms and at the price stated in his application to purchase. There were two tracts involved in the suit; one a pine timbered section, situated in Polk county, and classified as timber and valued at $8 per acre, and the other a tract classified as grazing land, situated in Jefferson county, and valued at $2 per acre. The former tract, according to my construction, could not be sold under Section 16, Act of 1895, for less than $8 per acre, cash, and the other, although it was isolated and detached, I declined to sell for three reasons. First. Because the sum offered was less than its appraised value. Second. Because it had been sold prior to 1895; was forfeited for non-payment of interest on July 20, 1899, but was not placed on the market again until September 1, 1899, and because the applications of the relator were filed in the office before the land was on the market, which, in accordance with previous decisions of the court, was illegal and could not be considered. Third. Because, to make the sale to the relator, would deprive the forfeiting purchaser of the prior right, for ninety days, to purchase the same again, under Section 9 of the Act of 1895, upon the payment of all past due interest.

The Supreme Court, on the application of the relator, P. O. Weber, against myself as Commissioner, directed the writ of mandamus to issue. The court construed the word "may," in the Act of 1897, relating to the sale of isolated and detached lands, as meaning *shall*, an undoubted word of command; that the Legislature had deprived the Commissioner of the Land Office of all discretion in the premises, and that he had no alternative but to sell the land on the application of the relator. With regard to the timbered section, the court held it must be sold at $1 per acre, on forty years time, at three per cent. interest, upon the payment by the relator of one-fortieth of the amount, $16 cash, into the treasury. As to the other tract, the court held it must be sold to the relator, and the fact that it was not on the market at the time the

relator's applications were filed, is immaterial. This, of course, deprived the forfeiting purchaser of his prior right for ninety days to purchase the land again, after it was again put on the market.

If the court adheres to its original opinion, the damage to settlers will be difficult to calculate, while the loss of several thousand dollars to the permanent school fund will be irreparable, because the decision of the court is decisive as to all similar applications, and, if the applicants demand it, might become necessary to take up and reconsider all such applications which have been rejected, but filed in the office during the past four years; cancel other sales, and make awards to those who have applied to purchase them as detached.

In this connection, I beg to inform your Excellency that I have requested the Attorney General to file a motion for a rehearing in said cause, and I have filed with him my reasons, at length, for asking it, and he is now preparing the motion.

As the Act of 1899 made but one amendment to the Act of 1897, and, in view of the present decision, further legislation is very necessary at this particular time, in order to protect the school fund, and to give force to the present law in order to protect former purchasers, actual settlers and lessees.

Very respectfully,

CHARLES ROGAN,
Commissioner General Land Office.

Supreme Court of the United States.

No. 107.—October Term, 1902.

Paul O. Weber, Plaintiff in Error, vs. Charles Rogan. } In error to the Supreme Court of the State of Texas.

[January 19, 1903.]

This was an original petition filed in the Supreme Court of Texas by the plaintiff in error, Weber, against Charles Rogan, Commissioner of the General Land Office of the State, praying for a writ of mandamus directing such Commissioner to award to the petitioner two isolated and detached sections of the public school lands, situated respectively in Polk and Jefferson Counties in the State of Texas.

The petitioner alleged in substance that on August 11, 1899, being desirous of purchasing such lands, he applied to the Commissioner for the same at the price fixed by law, $1 per acre, and otherwise fully complied with the terms of sale offered by law authorizing him to become the purchaser; that the Commissioner refused and rejected his applications, for the reason that the two sections applied for had theretofore been classified—the first as timber land, and the second as grazing land, to neither of which the law was applicable, and could not be purchased under the law in force at the date of the application for one dollar per acre, though such grazing and timber lands were isolated and detached from other public lands, and were situated in counties organized prior to January 1, 1875, and that there was no law under which the petitioner could have lawfully awarded to him the two said sections at one dollar per acre. Petitioner admitted that said two sections were classified by the Commissioner, one as timber land and the other as grazing land, but averred that such classification was of no force or effect because the provisions of the law requiring lands belonging to the public school fund to be classified did not relate or apply to isolated and detached sections, or fractions of sections of such lands, situated in counties organized prior to January 1, 1875, but that the price of said lands was at that time fixed by law at one dollar per acre, irrespective of any classification made of said lands either before or after the time they became isolated and detached. That by application to the Commissioner and depositing with the treasurer of the State the amount due therefor, he became the purchaser of said two sections, and the Commissioner was without authority to withhold from him said lands.

Upon this petition the case was submitted upon briefs and oral arguments to the Supreme Court, which awarded a mandamus, (94 Tex. 62,)

subsequently granted a rehearing (94 Tex. 67,) and upon such rehearing filed an opinion refusing the writ (94 Tex. 67.)

Whereupon petitioner applied and was granted a writ of error from this court, and assigned as error that the State had offered to sell all isolated and detached sections, and fractions of sections of public school lands situated in counties organized prior to January 1, 1875, at one dollar per acre; that this offer by the State was accepted by the petitioner, and that such acceptance constituted a contract between the State and the purchaser, and that by holding that the Commissioner of the Land Office might decline to award the petitioner the lands applied for the court gave a construction to the statute which impaired the obligation of such contract.

Mr. Justice BROWN delivered the opinion of the Court.

At the time the petitioner made his applications to the Commissioner of the Land Office for the purchase of these lands the following law was in force (2 Batt.'s Rev. Stat. art. 4218*y*):

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public lands, *may be sold* to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." (Acts of 1897, chap. 129.)

The Supreme Court held that the determination of the case depended upon the question whether it was made by this law the imperative duty of the Commissioner of the Land Office to sell all isolated and detached sections and parts of sections of the public free school lands to the first applicant without regard to their classification; and that that construction depended upon the question whether the words "may be sold to any purchaser" implied a discretion in the Commissioner to refuse, or was to be understood as equivalent to "shall," which would imply a duty upon the part of the Commissioner to sell to any purchaser at the price fixed of one dollar per acre. At first, the court was of opinion that the word "may" was used in the sense of "shall"; that no discretion was vested in the Commissioner; that the general provisions regulating the sale of public school lands did not apply to isolated and detached sections and fractions of sections; that they required no classification or appraisement; that the law of 1897 fixed their purchase price absolutely at one dollar per acre;

and that all that was necessary to acquire an inchoate title was to make application to the Commissioner and tender the proportion of the purchase money required by law to be paid in cash, together with the statutory obligations for the balance. Upon rehearing, the opinion of the court was changed, and the majority came to the conclusion that the word "may," as used in the statute, ought to be construed in its literal sense, and as merely conferring the power upon the Commissioner to sell land at one dollar per acre, but not making it obligatory upon him to do so. The mandamus was denied. Another rehearing was also denied.

There is hardly a semblance of a Federal question in this case. None such was noticed in the original petition or in either opinion of the court; and it was not until after an application was made for a rehearing that petitioner discovered that the act of the legislature of 1895, as amended by the act of 1897, (Rev. Stat. 4218*y*,) above cited, constituted a contract on the part of the State to sell all isolated and detached sections and fractions of sections of public school lands to any purchaser who would offer one dollar per acre therefor, which had been impaired by the Supreme Court of the State in holding that the Commissioner of the Land Office might refuse to execute such contract by declining to award the lands applied for, and therefore violated its obligation.

We agree with the Supreme Court of the State that no contract was created by this statute. Hence, there was none to be impaired. We had occasion to hold in *Central Land Company* v. *Laidley*, (159 U. S. 103,) that we have no jurisdiction of a writ of error to a State court upon the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract is made is admitted, and the only question is as to the construction of the statute by that court; and in the same case as well as in *Hanford* v. *Davies*, (163 U. S. 273,) we held that the constitutional inhibition applies only to the legislative enactments of the State, and not to judicial decisions or the acts of State tribunals, or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.

In addition to this, however, the question was not made until after the final decision of the State court, and upon application for a rehearing. This was clearly too late. (*Miller* v. *Texas*, 153 U. S. 535.)

The writ of error is *Dismissed.*

True copy.

Test:

Clerk Supreme Court, U. S.